In The

Supreme Court of Virginia

RECORD NO. 990175

LILLIAN PARKER DELK,

***Appellant*,**

v.

COLUMBIA/HCA HEALTHCARE CORPORATION, et al.

Appellees.

BRIEF OF APPELLANT

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Assignments of Error

I. That the Trial Court erred in requiring the plaintiff to descend into pleading matters of evidence, thereby short-circuiting litigation pretrial and denying plaintiff her right to a jury trial.

II. That the Trial Court erred in holding that plaintiff had no cause of action for negligence against the defendants.

III. That the Trial Court erred in holding that no special relation existed between the defendants and the plaintiff which gives to the plaintiff a right to protection.

IV. That the Trial Court erred in holding that no special relation existed between the defendants and the assailant which imposed a duty upon the defendants to control the assailant's conduct.

V. That the Trial Court erred in holding defendants could not reasonably foresee the risk to plaintiff and that she was not within the zone of danger of the assailant.

VI. That the Trial Court erred in ruling that all of the plaintiff's claims were medical malpractice.

VII. That the Trial Court erred in holding that plaintiff had not sufficiently alleged actual fraud.

VIII. That the Trial Court erred in holding that plaintiff had not sufficiently alleged punitive damages.

IX. That the Trial Court erred in holding that plaintiff had not sufficiently alleged intentional and negligent infliction of emotional distress.

Questions Presented

I. Whether requiring the plaintiff to descend into pleading matters of evidence short-circuited the proceedings and denied plaintiff her right to a jury trial. This question relates to assignment of error I.

II. Whether under all of the facts, the plaintiff has sufficiently pled any cause of action against the defendants for negligence. This question relates to assignments of error II, III, IV, and V.

II (A). Whether under all of the facts — including that the plaintiff was at all times a patient in the acute care wing of defendants' psychiatric hospital and that defendants were well aware of the plaintiff's bipolar disorder, her sedated condition, her predisposition to be sexually abused owing to prior sexual assaults and her need for round-the-clock observation — there was a special relation between the defendants and the plaintiff which gave the plaintiff a right to protection. This question relates to assignments of error II and III.

II (B). Whether under all of the facts — including that the assailant was at all times a patient in the acute care wing of defendants' psychiatric hospital and that defendants were well aware of the assailant's status as HIV-positive, his predisposition to commit sexual assaults, his history of disturbing interactions with other patients and his entry into plaintiff's room — there was a special relation between the defendants and the assailant which imposed a duty upon the defendants to control the assailant's conduct. This question relates to assignments of error II and IV.

II (C). Whether under all of the facts — including the fact that both the plaintiff and the assailant were at all times patients in the acute care wing of defendants' psychiatric hospital — defendants could reasonably foresee the risk to plaintiff and that she was within the zone of danger of the assailant. This question relates to assignments of error II and V.

III (A). Whether plaintiff had sufficiently alleged intentional infliction of emotional distress. This question relates to assignment of error IX.

III (B). Whether plaintiff had sufficiently alleged negligent infliction of emotional distress. This question relates to assignment of error IX.

III (C). Whether plaintiff had sufficiently alleged actual fraud. This question relates to assignment of error VII.

IV. Whether all of plaintiff's claims were medical malpractice. This question relates to assignment of error VI.

V. Whether plaintiff had sufficiently alleged punitive damages. This question relates to assignment of error VIII.

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Appellees.

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BRIEF OF APPELLANT

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Statement of the Facts

On February 21, 1997, Lillian Parker Delk (Mrs. Delk) was admitted to the psychiatric hospital of Columbia/HCA Healthcare Corp. and Virginia Psychiatric Company, Inc. (the defendants)[1] for a worsening of her bipolar disorder. Defendants determined that Mrs. Delk was a danger to herself and unable to function normally in her family, work or social environments. She was admitted for observation, intervention and management of both medical and psychological aspects of her disorder.[2]

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[1] Although most of the actions charged in all of the motions for judgment are charged to Virginia Psychiatric Company, Inc., it is alleged that it was either a partner or subsidiary of Columbia/HCA Healthcare Corp. which was responsible for its operations. Defendants never challenged the sufficiency of these allegations.

[2] Bipolar disorder is one of a number of mental disorders classified as mood disorders. Bipolar disorder itself is further subdivided into several categories, all of which are characterized by bouts of manic as well as depressive behavior to var-

At the time of her admission, defendants knew that Mrs. Delk's mood disorder was long-standing. They knew that she was bipolar, that she had previously been sexually assaulted, that her defenses against sexual assault had been weakened and that she was therefore more susceptible to similar assault than the average person. Increased sexual drive or indiscriminant sexual encounters with strangers can be features of manic episodes. *See*, *Diagnostic and Statistical Manual of Mental Disorders*, pp. 328-29 (4th ed. 1993). Because of all of the foregoing, defendants determined that Mrs. Delk needed round-the-clock observation and supervision and admitted her to their acute psychiatric care unit.

Simultaneously, defendants were also treating a certain adult white male (the assailant) in their acute psychiatric care unit. At the time, defendants knew that this individual had a history of, and predisposition for, making sexual assaults. They further knew that he had exhibited disturbing interactions with other patients in the form of violent threats during his admission at their psychiatric hospital. They further knew that he carried the human immunodeficiency virus (HIV) which causes Acquired Immune Deficiency Syndrome.

About a week after her admission, the assailant entered Mrs. Delk's room and raped her. Agents of the defendants actually witnessed the assailant entering Mrs. Delk's room.

Thereafter, in an effort to cover up their wrongdoing, the defendants failed to advise Mrs. Delk that she had been exposed to HIV. Defendants provided Mrs.

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ying degrees. Sometimes the two coexist and sometimes not. *See*, *Diagnostic and Statistical Manual of Mental Disorders*, pp. 350-66 (4th ed. 1993).

Delk no counseling, therapy or treatment for her injuries because they feared the consequences of their negligence.

Statement of the Case

On July 25, 1997, Mrs. Delk and her husband filed two lawsuits in the Circuit Court of the City of Hampton alleging that Mrs. Delk had been raped while a patient in defendants' hospital, and that defendants did nothing despite their knowledge the assault was occurring or that it was imminent. Mrs. Delk's causes of action included negligence, intentional infliction of emotional suffering, negligent infliction of emotional suffering and fraud in covering-up the negligence as well as a claim for punitive damages.[3] Defendants filed demurrers which were heard on November 17, 1997. The assailant was alleged to have been 'unknown' and the trial judge ruled from the bench that "I'm going to grant the demurrer with respect to the [plaintiff] not identifying whether [the assailant] was a patient or not. You need to re-plead it." App. 147.

By opinion dated February 2, 1998 and order entered thereafter, the Trial Court sustained all demurrers with leave to plead over.[4] App. 186-89.

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[3] The two suits were At Law Nos. CL97-36802 & -36803. Although there is some overlap in the allegations, the first suit (At Law No. CL97-36802) dealt generally with claims of negligence and the second (At Law No. CL97-36803) dealt generally with actions revolving around the cover-up. The second also alleged claims of Mrs. Delk and her husband for civil conspiracy, constructive fraud, breach of fiduciary duty and breach of trust and confidence. These will be referred to as the original motion for judgment in the negligence case and the original motion for judgment in the cover-up case, respectively.

[4] On defendants' motions to consolidate, the Trial Court also ruled that the two suits were "merged into one." App. 186. Thereafter, all pleadings were filed, and proceedings had, in At Law No. CL97-36802.

Mrs. Delk and her husband filed an amended motion for judgment.[5] This amended motion for judgment added an allegation that the assailant was a patient.[6] The defendants again demurred,[7] but filed grounds of defense as well.

By order entered June 2, 1998, the Trial Court again sustained all demurrers with leave to Mrs. Delk to plead over. App. 282-83.[8]

On June 17, 1998, Mrs. Delk again amended her motion for judgment.[9] This time she added allegations that the assailant was a patient in the acute care wing and that defendants knew his medical history, his history of sexual assaults, his predisposition for sexual assaults and his "troubling interactions with other patients." Defendants again demurred and answered. The demurrers were heard on September 9, 1998. The Trial Court announced its decision to sustain the demurrers from the bench "based on the Nassar [sic] and Dudley case." App. 337. By order entered October 22, 1998, the demurrers were sustained and the case dismissed.

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[5] This was on March 4, 1998. Mrs. Delk and her husband had filed an amended motion for judgment on December 10, 1997, prior to the Trial Court's ruling. Although the defendants filed pleadings in response to the December 10, 1997 amended motion for judgment, the Trial Court never addressed these. The March 4, 1998 motion for judgment is therefore sometimes referred to in the record as the second amended motion for judgment. It will be referred to here as the March 4 amended motion for judgment.

[6] It also eliminated the fraud, breach of fiduciary duty, breach of trust and confidence and civil conspiracy claims but retained allegations of negligence, negligent infliction of emotional distress and intentional infliction of emotional distress although not denominated as separate counts.

[7] This pleading, which was adopted by the co-defendant, App. 194, states that it was in response to the amended motion for judgment filed on or about March 2, 1998. App. 196.

[8] Mr. Delk's claims were dismissed with prejudice and the time for filing a petition for appeal expired without any petition being filed.

Mrs. Delk filed her notice of appeal within 30 days thereafter.

Summary of Argument

The Trial Court has inexplicably ruled that mental hospitals have neither the duty to protect the patients they treat nor a duty to control the behavior of the dangerous individuals they are in the business of housing. It has done so even when the mental hospital has notice of imminent danger as in the present case of a known psychotic rapist being treated as an acute care inpatient. Indeed, one patient in defendants' hospital has apparently raped another since the events giving rise to this case.[10] Such a policy would return us to the days when the word "bedlam" evolved from the conditions at St. Mary of Bethlehem Hospital in London, made infamous for the barbarism and chaos that attended its practice of placing the mentally ill together with inadequate supervision or treatment.

Notwithstanding that the standard, or duty, of care is virtually always a matter of evidence in the area of medical malpractice, the Trial Court made this ruling on demurrer and consequently without any evidence whatsoever. Defendants had demurred twice previously, complaining each time of a lack of specificity in Mrs. Delk's claim. Twice Mrs. Delk amended to add facts requested by defendants. Mrs. Delk is not required to plead matters of evidence. She omitted nothing "so essential to the action … that judgment, according to law and the very right of the cause" could not be given. Mrs. Delk was entitled to the opportunity to prove her case.

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[9] Although denominated "Third Amended Motion for Judgment," the Trial Court had only ruled on two rather than three pleadings previously. *See,* n. 5, *supra*. It will be referred to as the June 17 amended motion for judgment.

The Trial Court has short-circuited litigation pretrial and denied Mrs. Delk her right to a jury trial. This action of the Trial Court must be reversed.

Argument

The ordinary rule that the facts on appeal are viewed in the light most favorable to the prevailing party, *see*, *e.g.*, *Bayliner Marine Corp. v. Crow*, 257 Va. 121, 509 S.E. 2d 499 (1999), does not apply in this case. Likewise, the rule that the judgment of the Trial Court will be upheld unless it is plainly wrong or without evidence to support it under Va. Code § 8.01-680 (1992) has no application here. The case comes to this Court from a judgment sustaining demurrers. Since this Court is equally well situated to rule on a demurrer, this Court views the facts in the same manner as the Trial Court. All facts alleged in the motion for judgment as well as both those inferred from the facts alleged and those impliedly alleged are taken as true. *Fun v. Virginia Military Institute*, 245 Va. 249, 252, 427 S.E. 2d 181, 183 (1993); *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E. 2d 717, 717 (1988).

I. The Standard of Review on Demurrer

I. Whether requiring the plaintiff to descend into pleading matters of evidence short-circuited the proceedings and denied plaintiff her right to a jury trial. This question relates to assignment of error I.

Virginia has a strong policy that favors deciding cases on their merits rather than on rulings as to matters of form:

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[10] *See*, "Hospital Patient Accused of Rape," The Newport News-Hampton *Daily Press* p. B3 (November 20, 1998).

> No action or suit shall abate for want of form where the motion for judgment … sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action … that judgment, according to law and the very right of the cause, cannot be given.

Va. Code § 8.01-275 (1992).

The method for testing whether a case is sufficiently stated is by demurrer. *Id.* § 8.01-273 (A). Only those grounds of demurrer assigned will be considered by the court. *Id.* The motion for judgment "shall be sufficient if it clearly informs the opposite party of the true nature of the claim." Va. Sup. Ct. R. 1:4 (d). Thus, in ruling on the demurrer, the question is not whether the pleading is perfect.

> When a motion for judgment … contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer … And, even though a motion for judgment … may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer…

Catercorp, Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, 431 S.E. 2d 277, 279 (1993) (citations omitted).

A demurrer is not a ruling on the merits. "A demurrer, unlike a motion for summary judgment, does not allow the court to evaluate and decide the merits of a claim; it only tests the sufficiency of factual allegations to determine whether the motion for judgment states a cause of action." *Fun v. Virginia Military Institute*, 245 Va. 249, 252, 427 S.E. 2d 181, 183 (1993).

The plaintiff may rely not only upon the facts alleged and reasonable inferences drawn therefrom, but also on facts impliedly alleged. "A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E. 2d 717, 717 (1988) (citation omitted).

The defendants in this case could not possibly have lacked notice of the true nature of the claim. They knew they were being charged with negligence in failing to protect the plaintiff and negligence in failing to control the assailant. They knew they were being charged with fraud, negligent infliction of emotional distress and intentional infliction of emotional distress in covering up their negligence and in failing to treat. They knew they were exposed to punitive damages.

They were able to fashion grounds of defense. I Rec. 333 & 347.[11] They actively litigated the case, engaging in discovery.

Insofar as the negligence claims are concerned, Mrs. Delk's position is aided by two facts. First, in cases involving medical negligence, "[e]xpert testimony is ordinarily necessary to establish the appropriate standard of care." *Beverly Enterprises - Virginia, Inc. v. Nichols*, 247 Va. 264, 267, 441 S.E. 2d 1, 3 (1994)(citations omitted); Va. Code § 8.01-581.20 (1992). Indeed, the defendants themselves acknowledged that these were matters for evidence when they said "in a psychiatric facility, you're looking at the nursing care and the level of observation they would have to give to that patient. If someone walks in their room, they might have to run in there and say who is that person and why are they here." App. 144-45. And even more explicitly, that they "would need experts to talk about what the nurses needed to do, how much the physician needed to be there, how often she needed to be checked." App. 146.

Second, "[a]n allegation of negligence … is sufficient without specifying the particulars of the negligence." Va. Sup. Ct. R. 3:16 (b). In cases such as these, the facts are frequently in the control of the defendants. The defendants in this case have argued every step of the way that Mrs. Delk had to plead in greater detail and at the same time objected to her efforts to discover that very infor-

[11] The record on appeal is contained in eight volumes. Two volumes are the pleadings in At Law Nos. CL97-36802 & -36803. These are cited herein as volumes: I Rec. ___ and II Rec. ___, respectively. The remaining six volumes are transcripts of hearings held on November 17, 1997, March 17, 1998, June 16, 1998, July 13, 1998, August 11, 1998 and September 9, 1998. These may be cited herein as transcripts, e.g., Nov. 17, 1997 Tr. at __, Sept. 9, 1998 Tr. at __.

mation. *See*, App. 234-35. To prevent such manifest unfairness, the rules allow a general allegation and a thorough discovery of the facts.

Upon sustaining the demurrer, this became "another case 'in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits.' " *Catercorp, supra*, 246 Va. at 24, 431 S.E. 2d at 279, *quoting*, *Renner v. Stafford*, 245 Va. 351, 352, 429 S.E. 2d 218, 219 (1993).

II. The Causes of Action for Negligence

II. Whether under all of the facts, the plaintiff has sufficiently pled any cause of action against the defendants for negligence. This question relates to assignments of error II, III, IV, and V.

"To constitute actionable negligence, a legal duty must exist, and there must be a violation of that duty with resulting damage." *Burdette v. Marks*, 244 Va. 309, 311, 421 S.E. 2d 419, 420 (1992) (citation omitted). With regard to criminal assaults by third parties, such a duty arises "when a special relation exists (1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to protection to the plaintiff." *Id*. at 312, 421 S.E. 2d at 420. In the present case, there was *both* a special relationship between the defendants and the assailant which imposed a duty upon the defendants to control the assailant's conduct, *and* between the defendants and Mrs. Delk which gave Mrs. Delk a right to protection. The risk of the danger which befell Mrs. Delk was foreseeable and she was entitled to a trial on the merits.

II (A). The Cause of Action for Negligent Failure to Protect the Plaintiff

II (A). Whether under all of the facts — including that the plaintiff was at all times a patient in the acute care wing of defendants' psychiatric hospital and that defendants were well aware of the plaintiff's bipolar disorder, her sedated condition, her predisposition to be sexually abused owing to prior sexual assaults and her need for round-the-clock observation — there was a special relation between the defendants and the plaintiff which gave the plaintiff a right to protection. This question relates to assignments of error II and III.

For over a century, Virginia has recognized the right of a plaintiff to recover for criminal assaults by third parties where there is a special relation between the defendant and the plaintiff giving rise to a right of protection. *See*, *Connell v. Chesapeake & Ohio R. Co.*, 93 Va. 44, 24 S.E. 467 (1896). This landmark case held that the assailant's criminal act did not constitute the defense of independent intervening cause where the alleged fault was in permitting the assault. But there, unlike the present case, the plaintiff failed to allege that defendant had knowledge of the assault or notice of a risk.

No Virginia case has ever examined whether a hospital-patient relationship is such a special relationship; however, examples of special relationships between a plaintiff and defendant include carrier-passenger, *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921), business invitor-invitee, *Gupton v. Quicke*, 247 Va. 362, 442 S.E. 2d 658 (1994), and employer-employee, *A.H. v. Rockingham Publishing Co., Inc.*, 255 Va. 216, 495 S.E. 2d 482 (1998). Other cases have added the relationships of innkeeper-guest and landlord-tenant. *Klingbeil*

Management Group Co. v. Vito, 233 Va. 445, 357 S.E. 2d 200 (1987); *Gulf Reston, Inc. v. Rogers*, 215 Va. 155, 207 S.E. 2d 841 (1974).[12]

Given that these "special relationships" give rise to a right of protection, it is difficult to fathom how no such right would exist in the case of a doctor, hospital or other health care provider and a patient. The patient gives herself over to the care of the health care provider to a much greater extent than a business invitee, employee or guest at an inn. This is recognized in the ordinary standard of care owed by a hospital to its patient.

> [T]he degree of care exacted of a private hospital, conducted for profit, to their patients "is such reasonable care and attention for their safety as their mental and physical condition, if known, may require, and should be in proportion to the physical or mental ailments of the patient, rendering him unable to look after his own safety."

Jefferson Hospital, Inc. v. Van Lear, 186 Va. 74, 79-80, 41 S.E. 2d 441, 443 (1947) (citations omitted) (failure to supervise sight impaired patient resulting in fall), *cited with approval in, Beverly Enterprises v. Nichols*, 247 Va. 264, 267-69, 441 S.E. 2d 1, 3-4 (1994) (failure to assist patient who required assistance eating

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[12] Both of the cited cases deny liability in the context of a landlord-tenant relationship, but they did so saying there is no liability for "isolated" criminal acts of third parties, implying that there is liability for foreseeable criminal acts of third parties. *See*, *e.g.*, *Gulf Reston* at 158, 207 S.E. 2d at 844 (no "duty on a landlord to protect a tenant from isolated criminal acts of third persons" implying that there is a duty if the acts are not isolated or unforeseeable). Indeed, in many of the cases where the duty is based on a special relation between the plaintiff and the defendant, the question, although framed in terms of duty, involves a duty with respect to a foreseeable risk. The question was therefore one of foreseeablity rather than one of duty. *See*, *A.H. v. Rockingham Publishing Co.*, 255 Va. 216, 221, n. 4, 495 S.E. 2d 482, 486, n. 4 (1998).

There are two other landlord-tenant cases to like effect that "generally" there is no duty with respect to the acts of "unknown" third parties. *North Ridge Apartments v. Ruffin*, 257 Va. 481, 484, 514 S.E. 2d 759, 761 (1999) and *Holles v.*

resulting in choking). *See also*, *Danville Community Hospital Inc. v. Thompson*, 186 Va. 746, 43 S.E. 2d 882 (1947) (unexplained burn to newborn infant).

Although *Van Lear* preceded the enactment of the Virginia Medical Malpractice Act, the standard there stated is no different than the statutory standard which states in general terms "that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty." Va. Code § 8.01-581.20 (A) (1992). There is no essential difference. The statutory standard is stated in general terms to apply to all health care providers whereas *Van Lear* is stated in terms of a hospital only.[13]

In fact, there can be no doubt that the emphasis on safety evident in *Van Lear* remains the law. The hospital must provide a "safe" physical environment. 12 Va. Admin. Code § 35-102-290. It must apprise itself of the patient's "physical, emotional, behavioral, and social" condition. *Id*. § 35-102-900. It may not engage in or permit any abuse which includes any type of "sexual activity" or "condoning or permitting … [patient] to [patient] conflict which may result in physical, emotional, or psychological harm." *Id*. §§ 35-102-10 & -1270.

There can be no doubt that the hospital-patient relationship is a special relationship which gives rise to a duty to protect the plaintiff. Each of the motions for judgment under consideration adequately states this claim.[14] Yet the defendants continually argued that there was no special relation between them and Mrs.

Sunrise Terrace, Inc., 257 Va. 131, 509 S.E. 2d 494 (1999) (defendant management company not a landlord).

[13] In fact, the purpose of the statutory standard was not to change its basic formulation at all, but to ensure that reasonableness was judged in local terms.

Delk, citing primarily *Nasser v. Parker*, 249 Va. 172, 455 S.E. 2d 502 (1995). *Nasser*, however, involved the question whether there was a special relation between the defendants and the assailant not the defendants and Mrs. Delk — an entirely different question.

II (B). The Cause of Action for Negligent Failure to Control the Assailant

> **II (B). Whether under all of the facts — including that the assailant was at all times a patient in the acute care wing of defendants' psychiatric hospital and that defendants were well aware of the assailant's status as HIV-positive, his predisposition to commit sexual assaults, his history of disturbing interactions with other patients and his entry into plaintiff's room — there was a special relation between the defendants and the assailant which imposed a duty upon the defendants to control the assailant's conduct. This question relates to assignments of error II and IV.**

In contrast to the variety of relations which give rise to a duty of protection, there is only one circumstance, absent any relationship with the plaintiff, which gives rise to a duty on the part of the defendants to control the assailant, and that is having "taken charge" of the assailant.

Two prior cases have involved public officials. In *Fox v. Curtis*, 236 Va. 69, 372 S.E. 2d 373 (1988), the defendants were parole officers employed by the Department of Corrections. The defendants did *not* take charge of the assailant as parolees are free of incarceration and typically function independently in the community. They had discretion only to arrest a parolee and plaintiff was completely unknown to them. The other case was *Marshall v. Winston*, 239 Va. 315,

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[14] If a demurrer is sustained, the plaintiff is not prejudiced by having amended and may assert the viability of his former pleading. Va. Code § 8.01-273 (B) (1992).

389 S.E. 2d 902 (1990). There, defendant was a sheriff who, in his capacity as jailer, prematurely released the assailant from a sentence for carrying a concealed weapon. There was circumstantial evidence of the assailant's dangerousness, including statements of the assailant, but a failure to allege that it was known to the jailer. Plaintiff was completely unknown to defendant. Here the defendant obviously took charge of the assailant, but did not know that he was dangerous, let alone dangerous to the unknown plaintiff.

The remaining two cases involved private party defendants. In *Dudley v. Offender Aid and Restoration of Richmond, Inc.*, 241 Va. 270, 401 S.E. 2d 878 (1991), defendant contracted with the Department of Corrections to operate a half-way house. Under the contract, defendant had custody of, and was required to confine, the assailant as well as to notify the Department of Corrections of any unauthorized absence of more than two hours. This defendant did take charge of the assailant. In contrast to the narrow duty owed by public officials, as a private party who for hire takes charge of dangerous persons, it owed a duty to "all who come within [the assailant's] reach." *Id*. at 279, 401 S.E. 2d at 883. This was so even where, unlike the present case, the plaintiff was a stranger to the defendant, but Dudley was a resident within a "short distance" of the half-way house from which assailant escaped. The demurrer should therefore not have been sustained.

The most recent case is *Nasser v. Parker*, 249 Va. 172, 455 S.E. 2d 502 (1995). There, defendants were a psychiatrist and hospital treating the assailant. The plaintiff alleged that the assailant was a "voluntary" patient. As in *Fox*, the assailant was not actually in the custody of the defendants. He had terminated

his relationship with the psychiatrist and the hospital and had left. The plaintiff was known to the defendants since the assailant had made specific threats against her. A crucial fact was that the plaintiff had alleged that the assailant was a "voluntary" patient. This allowed the Court to address on demurrer whether the psychiatrist and hospital had legal custody of the assailant. Here, there is no such allegation. The nature of the assailant's admission, the facts and circumstances surrounding his stay and the requirements of medical or nursing practice are all matters for trial.

The case at bar is like *Dudley* and not the others. Defendants here are not public officials. They are "private parties who, for hire, take charge of dangerous felons." Unlike all of the other cases, the assailant here was in the actual, physical custody of the defendants at the time of the rape. While he was in such custody, defendants, who were operating for hire, were obligated to control the behavior of this known sex offender so as to protect "all who come within his reach." *Dudley*, *supra*, 241 Va. at 279, 401 S.E. 2d at 883.

The hospital has, at its disposal, tools to control and modify the behavior of a patient including under some conditions "the use of … physical force or any mechanical device (handcuffs, wristlets, muffs, camisoles or other such devices) that restricts the physical movements of an individual" and/or "the placing of a [patient] in an enclosed area secured in any manner that will not permit the [patient] to gain egress." Va. Admin. Code §§ 35-102-10 & -1230. Unless involuntarily admitted, a patient who will not cooperate with this or other treatment may be involuntarily terminated from treatment. *Id*. § 35-102-1350.

In light of the foregoing, it is undeniable that a hospital, the very purpose of which is to treat disorders which frequently manifest anti-social behavior, must control that anti-social behavior. Whether the assailant was voluntarily or involuntarily admitted is immaterial since the assault occurred *inside* the hospital. In *Nasser*, where the assault occurred outside of the hospital, the voluntary status of the patient was critical. Since the patient was voluntary, the hospital could not prevent the patient leaving and had no duty to warn of things it had no duty to prevent. Here, the hospital has a duty to maintain a safe environment for the patient. In the acute care unit of a psychiatric hospital, safety would be illusory indeed if it did not include safety from the anti-social behavior of other patients.[15]

II (C). Foreseeablity — The Role of the Fact That Defendants Had Relationships With Both the Plaintiff and the Assailant

II (C). Whether under all of the facts — including the fact that both the plaintiff and the assailant were at all times patients in the acute care wing of defendants' psychiatric hospital — defendants could reasonably foresee the risk to plaintiff and that she was within the zone of danger of the assailant. This question relates to assignments of error II and V.

The real issue in many of the third party criminal liability cases is the issue of foreseeablity. The risk to the plaintiff must be known or reasonably foreseeable in order for the plaintiff to recover. In *Burdette v. Marks*, 244 Va. 309, 421 S.E. 2d 419 (1992), a law enforcement officer actually witnessed the plaintiff being as-

[15] It is submitted that the original motion for judgment in the negligence case contained sufficient allegations from which one could infer that the assailant was a patient. The March 4 amended motion for judgment added a specific allegation that the assailant was a patient. The June 17 amended motion for judgment added an entire paragraph of facts regarding defendants' knowledge of the assailant. App, 288-89, ¶ 11.

saulted by the assailant and did nothing. Actual knowledge gave rise to a duty to protect the plaintiff.

A relationship with *either* the assailant or the plaintiff is critical on the issue of duty. While no case requires there to be a relationship with both, many cases have this factual pattern. This is because where there is a relationship with both, there is a greater likelihood of foreseeablity.

An example is *Norfolk & Western R. Co. v. Birchfield*, 105 Va. 809, 54 S.E. 879 (1906) where the verdict was held supported by evidence that there was an argument between plaintiff and a third party loud enough that the conductor heard it or "might have…had he been attentive to his duties." Likewise, in *Virginia Ry. & Power Co. v. McDemmick*, 117 Va. 862, 86 S.E. 744 (1915), the question whether the conductor was close enough to have knowledge of a fight between third parties was a question the plaintiff was entitled to have submitted to the jury. In these cases, both the assailants and the plaintiffs were passengers.

More recent and to like effect is *Gupton v. Quicke*, 247 Va. 362, 442 S.E. 2d 658 (1994). There, a business invitee was owed a duty of protection when the tavern-keeper witnessed an argument begun by the assailant with plaintiff. The defendant heard the assailant threaten plaintiff and nevertheless allowed the assailant to re-enter the tavern. Again, both the assailant and the plaintiff were invitees.

In the present case, the defendants actually witnessed the known psychotic rapist enter the room of Mrs. Delk who was known to be sedated, in need of round-the-clock observation and at heightened risk of sexual assault. By any

measure, the defendants clearly knew or had reason to know that the danger which befell Mrs. Delk in the form of the rape was either presently existing or imminent. She was certainly "within [the assailant's] reach."

Mrs. Delk is entitled to the opportunity to present evidence to support these allegations.

III. The Causes of Action Arising Out of the Cover-up

In addition to damages for defendants' negligence in failing to control the assailant and in failing to protect her, Mrs. Delk sued for damages sustained in the cover-up.

III (A). Cause of Action for Intentional Infliction of Emotional Distress

III (A). Whether plaintiff had sufficiently alleged intentional infliction of emotional distress. This question relates to assignment of error IX.

Virginia recognizes a cause of action for the tort of outrage commonly known as intentional infliction of emotional distress. In order to maintain such a cause of action, a plaintiff must show:

(1) The defendant specifically intended to inflict emotional distress, or intended his conduct when he knew or should have known that emotional distress would likely result.

(2) The *conduct*, not the resulting injury, was outrageous and intolerable which is to say that it offends generally accepted standards of decency and morality.

(3) The conduct caused the distress, and

(4) The distress is severe.

Russo v. White, 241 Va. 23, 400 S.E. 2d 160 (1991).

All of these elements are present here. The defendants, in order to hide from and escape their own liability, took numerous steps to execute a cover-up, all the time knowing that their patient would go untreated for severe injuries suffered while under their care. Such conduct offends generally accepted standards of decency and morality. On demurrer, the plaintiff is entitled to rely upon facts inferred from those facts which are alleged. *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E. 2d 717, 717 (1988). Clearly it is a reasonable inference that defendants who are mental health care providers, knew that emotional distress would likely result when they decided to execute their cover-up knowing all the while that Mrs. Delk was an untreated rape victim. While there may be some allegations of state of mind in conclusory terms, the intentional acts of the defendants are pled in great detail: falsification, failure to make required reports, failure to provide treatment. The original motion for judgment in the cover-up case contains a count for emotional distress, and all of the prior allegations are incorporated into that count. App. 11, ¶ 31. The same facts, and more, are pleaded in the March 4 amended motion for judgment and the June 17 amended motion for judgment, although the claims are not denominated as separate counts.[16] These facts to-

[16] Defendants have contended that the paragraphs containing the words emotional distress, App. 290, ¶¶ 20 & 21, was the entire claim for emotional distress. App. 295. Plaintiff concedes that these paragraphs do not by themselves state a cause of action, but contends that the pleading is to be judged as a whole by its content and not by mere matters of form.

gether with the reasonable inferences fully satisfy the requirement that intent be specifically alleged. Mrs. Delk should be allowed to present her case to the jury.[17]

III (B). Cause of Action for Negligent Infliction of Emotional Distress

III (B). Whether plaintiff had sufficiently alleged negligent infliction of emotional distress. This question relates to assignment of error IX.

This cause of action is for failure to treat the injuries sustained in the rape. While that conduct is more properly viewed as intentional or willful and wanton, the jury should be instructed that if they find that the conduct was neither intentional nor willful and wanton, then they should consider whether it was negligent. As in the case of intentional infliction, it may be that the "impact" in the form of the rape negates the requirement to plead specially this "non-tactile tort." Even if it doesn't, that requirement is met.[18]

Virginia allows a cause of action for negligent infliction of emotional distress. The first case to allow such a recovery was *Hughes v. Moore*, 214 Va. 27, 197 S.E. 2d 214 (1973). There, a woman was allowed to recover for fright and shock causing her to become weak, nervous and unable to breast-feed her baby. This was permitted despite the fact that there was no impact with the defendant providing that there was a clear causal connection between the wrongful conduct and the injury.

[17] Moreover, it is not clear if Mrs. Delk is required to comply with *Russo*. That case is framed in terms of recovery for a "non-tactile tort." *Russo*, *supra*, 241 Va. at 26, 400 S.E. 2d at 162. Because she suffered both actual physical contact and physical injury at the hands of defendants she arguably need not meet any special pleading requirement.

Subsequent cases have made clear that *Hughes* requires that there be a physical injury. *Myseros v. Sissler*, 239 Va. 8, 387 S.E. 2d 463 (1990) (emotional distress resulting from a traffic accident not sufficient). Mrs. Delk was more than the victim of a traffic accident, she was left untreated when it was known that she was the victim of one of the most heinous crimes known to humanity. This is certainly "physical injury" within the meaning of *Hughes*.

Although, the case of *Naccash v. Burger*, 223 Va. 406, 290 S.E. 2d 825 (1982) has been said to have been limited to its facts,[19] the opinion provides guidance to ferret out spurious claims which is what the original purpose of the impact rule was. "[N]o one suggests that the … emotional distress was feigned or that [the] claim was fraudulent. … [I]t would be wholly unrealistic to say that [plaintiffs] were mere witnesses to the consequences of the tortious conduct involved in this case." The "emotional distress was … a direct result of wrongful conduct" as shown by "an unbroken chain of causal connection." *Id.* at 408, 290 S.E. 2d at 831. Subsequent cases have explained that a duty was owed to the father in *Naccash* since it was his blood being tested. *Gray v. INOVA Health Care Services*, 257 Va. 597, 514 S.E. 2d 355 (1999).

Mrs. Delk was certainly no mere witness and was owed a duty since she was the patient. No one has suggested that she is feigning or questioned the causal connection. She should be allowed her day in court as to her emotional distress resulting from defendants' negligence.

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[18] The comments contained in n. 17, *supra* and the accompanying text apply with equal force here.

[19] *See*, *e.g.*, *Bulala v. Boyd*, 239 Va. 218, 389 S.E. 2d 670 (1990) and *Myseros v. Sissler*, 239 Va. 8, 387 S.E. 2d 463 (1990).

III (C). Whether plaintiff had sufficiently alleged actual fraud. This question relates to assignment of error VII.

> [F]raud is infinite in variety; sometimes it is audacious and unblusing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could afford it.

Reddaway v. Banham, [1896] A.C. 199, 221 (MacNaghten, L.J.).

The infinite variety of fraud has led the courts to be wary of attempting to precisely define what constitutes fraud because of the ability of people to scheme around any definition.

> Although fraud has been said to be every kind of artifice employed by one person for the purpose of deceiving another, courts have refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so protean in its disguises, as to render it almost impossible to give a definition which fraud would not find a means to evade.

Shoemaker v. Cake, 83 Va. 1, 5, 1 S.E. 387, 389 (1887).

Lord MacNaghten correctly pointed out that the one thing that distinguishes all fraud is dishonesty. What could be more dishonest than a health care provider, ignoring its duty to inform the patient and embarking on a course of misrepresentation and non-disclosure designed to prevent pecuniary loss to itself? Upon reflection, a cover-up seems to be precisely an "artifice employed by one person for the purpose of deceiving another."

"The elements of actual fraud are: (1) a false representation, (2) of a material fact, 3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Winn v.*

Aleda Constr. Co., Inc., 227 Va. 304, 308, 315 S.E. 2d 193, 195 (1984) (citations omitted).

Mrs. Delk alleged that her medical records had been falsified in that defendants (1) "falsely represented and reported;" App. 8, ¶ 12, (2) the rape, the HIV status of the assailant, and the negligence in allowing it to occur; App. 8, ¶¶ 11 & 12, App. 9, ¶ 19, (3) "intentionally and knowingly" and while "aware of this sexual assault of [Mrs.] Delk;" App. 8, ¶ 12, App. 9, ¶ 18, (4) "with intent to deceive [Mrs.] Delk" and in order to "cover-up the sexual assault of [Mrs.] Delk and the negligence of Defendant;" App. 9, ¶¶ 18 & 19, (5)and that the resulting reliance on defendants' misrepresentations caused; (6) emotional and psychological damage to Mrs. Delk due to the rape itself as well as HIV exposure and treatment not rendered. *Id*.

Since this was partially a failure to report, the question arises whether there was a misrepresentation, but there need be no misrepresentation.

> A fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, speech or silence, word of mouth, or look or gesture.

Frowen v. Blank, 493 Pa. 137, 425 A. 2d 412, 415 (1981) (citations omitted).

"Concealment of a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, is as much fraud as if existence of the fact were expressly denied." *Metrocall of Delaware, Inc. v. Continental Cellular Corp.*, 246 Va. 365, 374, 437 S.E. 2d 189, 193 (1993) (citation omitted). In any event, a false representation is alleged.

The element of reliance has also been questioned. How does one rely upon that which one does not know? By taking no action when action was plainly called for. Action is plainly called for when a woman has been raped, especially if the assailant is HIV positive.

All of these allegations are present in the original motion for judgment in the cover-up case[20] and it is a matter for trial to prove that was the case.

IV. The Definition of Medical Malpractice

IV. Whether all of plaintiff's claims were medical malpractice. This question relates to assignment of error VI.

There are five separate and distinct causes of action at issue in this appeal: (1) the cause of action for negligent failure to protect Mrs. Delk, (2) the cause of action for negligent failure to control the assailant, (3) the cause of action for negligently inflicting emotional distress upon Mrs. Delk as a result of the cover-up, (4) the cause of action for intentional infliction of emotional distress in the cover-up, and (5) the cause of action for fraud in the cover-up.

The Trial Court ruled that "this is strictly a medical malpractice case under Virginia Code Section 8.01-581.1 et seq." App. 186-87. The Trial Court instructed Mrs. Delk to allege "negligence and gross negligence and plead for punitive damages." *Id.* This whittling away of Mrs. Delk's claims was error.

In the first place, Mrs. Delk may have multiple theories of recovery that are medical malpractice. "'Malpractice' means any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." Va. Code § 8.01-581.1 (1999 Supp.) By saying "any

tort," the statute itself recognizes that the fact that because several causes of action may arise out of health care does make them one single cause of action. "[I]t cannot be disputed that assault and battery as well as intentional infliction of emotional distress are "torts," and qualify as "any" tort under the Act." *Hagan v. Antonio*, 240 Va. 347, 350, 397 S.E. 2d 810, 811 (1990). Yet the defendants continually argued, and continue to argue, that the other causes of action are "subsumed in medical malpractice."

Furthermore, Mrs. Delk has causes of action which are not medical malpractice. She has alleged causes of action for fraud and intentional infliction of emotional distress against defendants for falsifying her medical records and otherwise covering-up their negligence. Health care does not include defrauding the patient and cannot include the alteration of medical records for purposes having nothing to do with "care." *See*, *e.g.*, *Peterson v. Fairfax Hospital Systems, Inc.*, 31 Va. Cir. 50 (Fairfax Cty. Cir. Ct., 1993); *Dell v. French*, 38 Va. Cir. 91 (Fairfax Cty. Cir. Ct., 1995).

If any part of the purpose in ruling that all of the claims were malpractice was to decide the applicability of the damages limitation, it is premature since that question does not arise until after verdict. *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 376 S.E. 2d 525 (1989).[21]

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[20] The allegations are contained in Count II, App. 9, ¶¶ 18 & 19, and the first fourteen paragraphs of generic allegations not under any count. App. 6-8, ¶¶ 1-14.

[21] In any event, the application of the damages limit turns on whether the plaintiff is a "patient." Va. Code § 8.01-581.15 (1992). As to the claim based on the relationship between the defendants and the assailant, liability does not flow from the treatment or failure to treat the assailant, but rather from defendants' failure to control the assailant, known to them to be a dangerous felon who they were keeping for hire, during the actual time he was in their custody. It is not an ele-

V. Punitive Damages

V. Whether plaintiff had sufficiently alleged punitive damages. This question relates to assignment of error VIII.

The judgment appealed from dismisses all claims, including those for punitive damages. Punitive damages may not be recovered for gross negligence alone, but may be awarded for gross negligence if the defendant acted "wantonly, oppressively, with such malice or recklessness as implied a spirit of mischief or criminal indifference to his obligation." *Wright v. Everette*, 197 Va. 608, 612-13, 90 S.E. 2d 855, 859 (1956). In order to recover punitive damages, the plaintiff must show “misconduct or malice, or such recklessness or negligence as evinces a *conscious* disregard of the rights of others." *Baker v. Markus*, 201 Va. 905, 909, 114 S.E. 2d 617, 621 (1960) (emphasis in original), *quoting*, *Wood v. American Nat’l Bank*, 100 Va. 306, 40 S.E. 931 (1902).

Punitive damages have been awarded in cases of malice, *Lee v. Southland Corp.*, 219 Va. 23, 244 S.E. 2d 756 (1978) (malicious prosecution action where the primary motivation for the prosecution was not to bring the plaintiff to justice but to collect the cost of replacing a broken glass door), intentional conduct, *Worrie v. Boze*, 198 Va. 533, 95 S.E. 2d 192 (1956) (breach of a covenant not to compete including the solicitation of the former employer’s customers), willful and wanton conduct, *Infant C. v. Boy Scouts of America*, 239 Va. 572, 391 S.E. 2d 322 (1990) (pedophile doesn't intend harm but knows it will likely occur) and negligence. *Friedman v. Jordan*, 166 Va. 65, 184 S.E. 186 (1936) (chasing a

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ment of that claim that the plaintiff be a "patient" and the limitation does not apply.

bicyclist with a car and running over him), *Webb v. Rivers*, 256 Va. 460, 507 S.E. 2d 360 (1998) (driving 90 m.p.h. in a residential neighborhood and through a red light while having a blood alcohol level of .21 and not knowing the location or time), and *Griffin v. Shively*, 227 Va. 317, 315 S.E. 2d 210 (1984) (firing a gun with other people present in a small room).

In this case, plaintiff has alleged intentional conduct, willful and wanton conduct, and that defendants had "total and utter disregard for the safety and psychological well-being" of the plaintiff. The original motions for judgment in both the negligence case and the cover-up case and the June 17 amended motion for judgment denominate the punitive damages as such. App. 5, ¶ 30, App. 11, ¶ 30, App. 29, ¶ 23. The March 4 amended motion for judgment does not, but the import of the paragraph containing the allegation is inescapable. App. 193, ¶ 22. Under these circumstances, defendants are on notice that they are exposed to punitive damages and why and so cannot complain that punitive damages have been insufficiently pled. Whether those damages should be awarded and in what sum are matters for trial.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Honorable Court reverse the judgment of the Trial Court and remand this case for trial on the merits.

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Certificate

I, Joseph Ryland Winston, a member of the Bar of this Court, hereby certify that I wish to state orally the trial court should be reversed, and further certify that on July 12, 1999, I served three copies of the foregoing document on the following listed persons, which include all of the parties required to be served, by depositing it in a United States mailbox with first class postage prepaid and addressed to:

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