

1 VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK

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4 THELMA E. MAHONE, ADMINISTRATRIX
5 OF THE ESTATE
6 OF FELICIA T. MADISON, DECEASED,

7 Plaintiff,

8 -vs-

9 SENTARA HOSPITALS, ET AL.,

10 Defendants.

MOTION

AT LAW NO.:
CL09-560

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Before: The Honorable Rodham T. Delk, Jr.,
Judge of the aforesaid court.

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Date: February 5, 2010

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Place: Suffolk, Virginia

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APPEARANCES:

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PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C.,
By: Mr. Avery T. Waterman, Jr.,
Counsel for the plaintiff.

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YOAKAM & ETHERIDGE, P.L.C.,
By: Mr. Ted G. Yoakam,
Counsel for the defendants.

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21

ALSO PRESENT:

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MS. AMANDA H. GOODWIN, R.N., M.S.N., CPHQ,
Director QM/RM,
Sentara Obici Hospital.

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25 Reported by: Robin L. Delloro, R.P.R.

ORIGINAL

1 THE COURT: Sorry we're in here, but we're
2 running out of real estate, and otherwise we would be down on
3 the second floor this morning.

4 All right.

5 MR. YOAKAM: Well, Your Honor, I'm sorry we're
6 here; and as a preliminary matter, in fairness to Mr. Waterman
7 and probably to the Court, he should be aware that a report to
8 the Virginia State Bar has been made over this incident as
9 well. So I think that they will be launching an investigation
10 as well, and I think that he needed to know that before we
11 proceed today.

12 THE COURT: Well, you've stated that, and I want
13 to say this before we get into it: Medical malpractice cases
14 are difficult enough. The stakes are very high, and when you
15 have high stakes, they usually involve significant -- there is
16 a lot of emotion from both sides invested in these cases -- I
17 am aware of that -- and coupled with that, these cases are
18 very complex. They take a huge amount of time to prepare.
19 They take a -- in the universe of cases that we actually try
20 in this court, they take more time than virtually any other
21 kind of case, and they uniformly take that kind of time
22 because they're complicated.

23 Because of the high stakes, there is a lot that
24 produces -- the stakes in the case alone produce enough
25 tension between the lawyers that from time to time that

1 tension manifests itself, and one of my principle jobs, as far
2 as I am concerned, is -- and I hate to be the umpire or the
3 referee, but I have to do that.

4 These cases are going to be concluded, and there
5 are -- there is a relatively small community of lawyers who
6 handle these cases on both sides. They know each other; and
7 in the vast, vast majority of the cases that I have involving
8 medical malpractice, the lawyers, they cannot make these cases
9 work -- regardless of the result, they can't put on the case
10 efficiently without full cooperation with each other and a
11 high level of professionalism; and I'm pleased to say the
12 lawyers that are involved in these kinds of cases exhibit
13 uniform professionalism to the highest degree, and it makes my
14 job easier, but -- it makes everyone's job easier, and it has
15 to be that way because the community of the medical
16 malpractice lawyers is so small that all of them generally
17 know I'm going to be professional because we are going to be
18 going around this bend again in another case.

19 I read Mr. Yoakam's petition. I am going to say
20 I was disturbed by it, and so I'm not making -- I am not going
21 to make any judgments about ethics in this case, but I am
22 laying down for everybody right now there are other -- there
23 are other venues to determine ethical issues. I don't. But I
24 have my own standards for professional conduct by lawyers, and
25 it holds the same in every case I get whether it is a medical

1 malpractice case or \$2500 fender-bender case, and I have a
2 very high expectation of professionalism.

3 Professionalism is not ethics. Ethics, we've
4 got a code of that. Professionalism goes far beyond that, and
5 so we are going to hear this, but I want both of you to know
6 my expectations of professionalism on the part of lawyers is
7 very high, particularly in cases like this which require a
8 high degree of professionalism just to simply get the cases
9 either settled or tried to a verdict.

10 So, Mr. Yoakam, you may start.

11 MR. YOAKAM: Your Honor, as you know, we were
12 before the Court, I believe, on Tuesday, and I think at that
13 point, the only thing -- the only matter in dispute was
14 whether Sentara would produce an incident report.

15 As the Court will recall, we briefed the matter
16 and asserted a privilege under 8.01-581.17, I believe; and
17 during the course of the hearing, I got up and said my piece,
18 and of course the Court had some questions of me.

19 I sat down, and Mr. Waterman then addressed the
20 Court and had raised what I thought was a new argument that
21 was nuanced and, I thought, was well stated, and I told him
22 that; and I told the Court at the time that because of that
23 argument -- and the Court will recall he had brought out
24 pieces of nursing entries that dealt with issues of timing,
25 about what things happened when; and because of Mr. Waterman's

1 address to the Court, it did cause me to change my mind about
2 producing this document for discovery purposes; and that was
3 the universe in which we were operating.

4 Because of Mr. Waterman's compelling argument, I
5 turned that incident report over to him in open court, and
6 that was not a -- I did not understand it -- and I don't think
7 Mr. Waterman understood it, the Court, anyone else -- that I
8 was turning this over for all purposes. It was for the
9 purpose which we were -- the issue was noticed, and that was
10 at that point for discovery purposes, and I was turning it
11 over.

12 I thought we had resolved the matter in a way
13 that made sense for everyone. Mr. Waterman wanted the -- he
14 told the Court that he wanted the incident report to pursue
15 discoverable evidence and that sort of thing; and given what
16 happened, I thought that made sense.

17 So I went away from that hearing actually
18 feeling like I had done a good thing in being flexible and
19 adapting to what I thought was a compelling argument by
20 plaintiff's counsel. I went about my business and came in the
21 next morning to my horror receiving a call from the corporate
22 director of the risk management division of Sentara who
23 informed me that Mr. Waterman had created the blogs which are
24 at Exhibit 1 and 2 which I think is -- I think it is damaging
25 for the case.

1 First of all, I was just flabbergasted to see
2 it. In my years of practice, I have never seen anything like
3 this in an active lawsuit. I was personally disappointed the
4 light in which he portrayed what I did in the hearing which I
5 don't think was fair. That is sort of an aside, though.

6 But going to the heart of the matter, I think it
7 is -- any neutral read of this blog, plaintiff is arguing the
8 facts as he sees them in an active lawsuit and then went on to
9 refer to the incident report and publicly disclosed the
10 information in this incident report, using the language like
11 tell-tale and that sort of thing, I think really
12 mischaracterizing what is actually in that incident report.

13 As I addressed the Court, essentially this
14 incident report was created to explain the return of an unused
15 but spoiled unit of blood. Pursuant to the system that was in
16 place at Sentara, the staff had to create a record to explain
17 why this unit of blood was going to be destroyed and was not
18 used.

19 I just think it is so beyond the pale, Your
20 Honor, to do this in an active medical malpractice case. It
21 risks contaminating the jury pool. It makes Sentara's
22 position in defending this case more difficult. I just don't
23 think it is proper on any level, and that is why I asked for
24 the relief that I asked for, that the blog immediately be
25 removed, and any cached versions -- because I

1 understand -- I'm kind of a knucklehead when it comes to the
2 Internet, but I understand once these things are created, it
3 is very difficult to get them removed, and there are cached
4 versions -- it's c-a-c-h-e-d -- that need to be specifically
5 removed. I think that should be removed, as a preliminary
6 matter, to stop the harm to Sentara.

7 Given that he has now in his filings seemed to
8 have asserted the right to publicly disclose the information of
9 the incident report, effectively I think that the incident
10 report, any copies should be returned to the Court until the
11 Court has a chance to get to the bottom of this.

12 You will see I have asked for other relief, but
13 it is only on the heels of a properly noticed and briefed
14 hearing because the nature of this -- we thought that this was
15 an alarming situation that we needed to deal with on an
16 emergent basis, and I don't think it's fair to Mr. Waterman
17 and probably not fair to us that we breach the other issues.

18 But I think the seriousness of this situation
19 warrants a formal hearing at a later date to deal with these
20 other issues, and that's what I would ask.

21 THE COURT: Mr. Waterman?

22 MR. WATERMAN: As I said at the last hearing,
23 this issue is controlled by *Riverside Hospital vs. Johnson*.
24 The Supreme Court was extremely clear in 2006 that incident
25 reports like this --

1 THE COURT: I don't think we are talking about
2 the admissibility of that anymore -- wait a minute. This is
3 not about whether the report should have been a matter of the
4 Court determining the admissibility or -- determining
5 discoverability is really what -- it was a discovery issue.
6 This hearing is about what occurred after Mr. Yoakam handed
7 over the document.

8 MR. WATERMAN: And what I am trying to make a
9 record of bears on that. The Supreme Court in *Riverside* was
10 extremely clear that this is my client's -- or my client's
11 patient care record just like what they put in the chart, and
12 the fact that they segregate and keep double books doesn't
13 change that it was her record, and my client could take
14 anything in her chart -- lab records or anything else -- and
15 distribute that as she sees fit because it is her information,
16 and any confidentiality is held by the patient, not the
17 institution.

18 So we can't lose sight of that, as a court.
19 This is a patient health care record, and although Sentara
20 knowingly chose to avoid judicial determination of
21 pronouncement of that, that is the fact, and that is critical
22 to this situation including the rights to do with it as I did.

23 So that is just pivotal, Your Honor. This is a
24 patient care record. This is just like something in my
25 client's chart, and as counsel indicates when he says he

1 focused on the new argument was a compelling argument, it
2 should have been a prevailing argument. As I indicated to the
3 Court, in over 15 years, I have never had a court not find
4 these incident reports to be patient care records. It has
5 always been vindicated.

6 Now, they, prudently, I will say, chose to
7 short-circuit an official determination of that, but that
8 doesn't change things. That doesn't give -- the fact that
9 counsel appreciated that an adverse order likely should and
10 would come down doesn't give any special protection, doesn't
11 change the character of things.

12 Counsel, in avoiding an order, turned over my
13 patient's health care record as they should have months or a
14 year ago, just belatedly. There was absolutely no request for
15 any sort of protection. There was no request for a protective
16 order, and I would not have agreed to a protective order.

17 If counsel had conditioned him turning over the
18 record, my client's health care record, a protective order
19 that I couldn't use my own client's record as I saw fit, I
20 never would have agreed to that, so we would have necessarily
21 proceeded with a judicial determination indicating that that
22 is a health care record like the Supreme Court says it is.

23 So counsel is acting as if he had a protective
24 order. If I violated a protective order, I get that, but I
25 didn't. So, again, he didn't ask for one. I never would have

1 agreed to one, and one never should have been issued in the
2 matter. He knowingly and voluntarily turned over my client's
3 health care record to me without any restriction or strings
4 attached as is appropriate, belatedly; and I was free to use
5 that as sees fit, just like I can use her lab report or any
6 other nurse's note.

7 Now, these just -- and it is commonplace. It is
8 a daily occurrence around the state that attorneys are sharing
9 with one another what goes on in all courts, malpractice and
10 otherwise. I have had a LISTSERVE for years, for over a
11 decade. I have been on a LISTSERVE with prominent medical
12 malpractice attorneys around the state, 50 or more attorneys I
13 know practice in this court; and I can represent to you that
14 whenever any of us comes upon a significant favorable or
15 unfavorable determination in court, we share it.

16 Somebody may send me an order on any topic as
17 far as they got an incident report. They got policies and
18 procedures. They suffered an expert being struck, whatever it
19 is. That is going on every day, and it is not only the
20 LISTSERVE I am on; and although the practice has changed since
21 Your Honor was practicing, blogs are prevalent. They
22 are --

23 THE COURT: We didn't even have an Internet when
24 I was practicing law, Mr. Waterman.

25 MR. WATERMAN: Nor when I started, but blogs are

1 prevalent, but if you would go to my blog on the web site, you
2 would see links to other lawyers. For example, you would see
3 a link to Pierce & Thornton.

4 THE COURT: I have already said I recognize it
5 is a small community of lawyers in the medical malpractice
6 field simply because there is -- well, it is a small community
7 of lawyers sufficiently highly skilled to have the opportunity
8 to regularly try these cases.

9 MR. WATERMAN: And I mention the blog because
10 that is what has come under attack. You see Pierce &
11 Thornton. You see Hall & Sickels. Bob Hall is past president
12 of VTLA. You see Pat Long, president of the Maryland State
13 Bar; Ben Glass who actually does more business advising as to
14 legal marketing, as it be, than perhaps practicing. That is
15 just a handful.

16 It is just everywhere and commonplace, and there
17 is nothing, absolutely nothing inappropriate with me posting
18 on a blog what transpired in an open court not subjected to
19 any kind of protective order.

20 That is just like there's absolutely nothing
21 wrong with me, when that transcript is transcribed, sending it
22 to *Virginia Lawyers Weekly* and them deciding whether or not
23 they think it is newsworthy or not, and if they think it is
24 newsworthy, they might write a front-page article about that
25 as significant for incident reports. They may not. They may

1 not choose to cover it.

2 But this is done all the time. Most of -- to be
3 honest with you, most of the articles that are in *Virginia*
4 *Lawyers Weekly* are the result of lawyers, plaintiff and
5 defense, submitting letter opinions, orders, transcripts,
6 other materials to the newspaper for them to parse through,
7 investigate, and write about as it sees fit. This doesn't
8 even rise -- my blog doesn't even rise to the level of that.

9 Going back to 1975, *Goldfarb v. Virginia State*
10 *Bar*, the lawyer advertising has been --

11 THE COURT: My father was a defendant on that
12 case. He was on the council at the time.

13 MR. WATERMAN: Well, then, you know better than
14 me, but for 35 years, that has been the law of the United
15 States. I say that only because the blog has been
16 characterized as self-serving or something to that effect.

17 So my point is even if we frame it as purely
18 advertisement as opposed to informational, it is still
19 permitted; and the fact that the case is ongoing doesn't
20 change that because, again, *Virginia Lawyers Weekly* is
21 constantly publishing current rulings in ongoing cases.

22 Counsel has a massive multiparty case going on.
23 He has told me, I thought, he had spoken to *60 Minutes* about
24 it. I am just stunned, stunned that the person who is
25 attacking me in this particular forum and apparently ethically

1 himself is going on television and other medium about his
2 ongoing case and yet pillories me for doing something of much
3 less magnitude. The inconsistency is just stunning.

4 So as I have indicated here, Your Honor, I
5 understood we were past this. I understood they had
6 capitulated and -- without any reservation or qualification
7 and that I have my client's medical record, my client's health
8 care record, according to the Supreme Court, and I am free to
9 do with that what I have done and other things and that it is
10 not privileged, absolutely not privileged; and even if
11 arguably there was any privilege whatsoever, that was
12 knowingly waived when they chose to turn over the document to
13 me unfettered.

14 So not only is this not -- this whole proceeding
15 here -- and I think the bar -- is baseless and vexatious, and
16 it is intolerable. It is an intimidation, punishment thing
17 for what they chose to do. They chose to avoid the merits of
18 determination. They chose to give me my patient's health care
19 record.

20 THE COURT: Anything else?

21 MR. YOAKAM: Your Honor, the issue of whether
22 the incident report is a patient care record was not before
23 the Court. The Court made clear that the landscape of that
24 hearing was whether the document would be turned over for
25 discovery purposes. The Court made it very clear numerous

1 times.

2 THE COURT: It is an incident report which is an
3 internal hospital management document. It would appear to me
4 to be --

5 MR. WATERMAN: *Riverside* says it is a patient
6 care record.

7 THE COURT: The *Riverside* case, was that a
8 Supreme Court case or circuit court?

9 MR. WATERMAN: Two thousand six Supreme Court
10 case.

11 THE COURT: And it held that an incident report
12 was a patient record?

13 MR. WATERMAN: Yes, sir, and hospital --

14 THE COURT: I didn't read the case because I
15 didn't have to after the hearing so -- but I will accept your
16 statement as to that.

17 All right. Anything else?

18 MR. YOAKAM: I said my piece, Your Honor.

19 THE COURT: Well, I am not going to go around
20 with the paintbrush painting lawyers different colors for
21 different degrees of what I personally consider to be
22 professionalism. That is not my job as a judge. In this
23 particular case, I decline to grant the relief Mr. Yoakam
24 requested.

25 I will note your exception, Mr. Yoakam.

1 As far as the rest of this, Counsel, I said it
2 in one way, and I will say it another: Mr. Waterman referred
3 to my age. I guess when I practiced law, it was a kinder and
4 gentler universe that we worked in. But that is not to
5 criticize the current universe that we work in now.

6 If we are going to do this, if we are going to
7 have this kind of a hearing every time, this case is going to
8 cost your clients unnecessarily every time we have a hearing
9 like this.

10 Mr. Waterman, you indeed are free -- you can
11 publish whatever you want, and if people consider that is
12 unethical, they can do what they feel they need to do. I
13 don't make those judgments.

14 I simply reiterate my prologue in this hearing
15 about what I consider to be the overarching need for voluntary
16 professionalism on the part of the lawyers, and that
17 goes -- that goes to the heart of the relationship between the
18 lawyers who are trying the case, and I have said what -- I
19 think I made myself clear as to what I consider the need for
20 that sort of relationship in a case like this. That is all I
21 am going to say.

22 I have denied the request sought by Mr. Yoakam,
23 and that should end this particular matter today.

24 MR. WATERMAN: Your Honor, I requested under
25 8.01-271.1 attorney's fees. I have in total spent about six

1 hours in my time. I bill my time at almost \$400 an hour.
2 This was not well founded. There was no good basis, and it is
3 a very vexatious, intimidating kind of motion without any
4 foundation.

5 THE COURT: I am not going to pass further -- I
6 have said all that I think I should say in the case, but I
7 will say that your request for attorney's fees is denied, and
8 I will note your exception to that ruling.

9 MR. WATERMAN: Yes, Your Honor.

10 THE COURT: Now, if we want to prepare an order
11 for today, you may prepare the order, Mr. Waterman.

12 MR. WATERMAN: I will do that right away.

13 MR. YOAKAM: Going forward since plaintiff's
14 counsel has asserted the right -- and I don't know if the
15 court had a chance to read it, plaintiff's counsel says that
16 he has disseminated the report widely and here today has
17 asserted that right. What are we to do as this goes forward?
18 Because plaintiff's counsel has made it clear to the court
19 that he intends to do whatever he wants with it.

20 THE COURT: And, Mr. Yoakam, I just said that is
21 the profession we are in today, and I am going to say I think
22 it is unfortunate that this had to happen, but Mr. Waterman is
23 free to --

24 MR. YOAKAM: Now --

25 THE COURT: -- I have not placed -- if there is

1 an issue about matters being placed under seal, those issues
2 need to be brought to the Court. It is no point in placing it
3 under -- I am not going to order Mr. Waterman to remove
4 everything from the blog on the Internet simply because the
5 matter -- this was turned over.

6 I am not voicing any criticism of Mr. Yoakam. I
7 think I will say he acted fully professionally in turning the
8 document over. I have no -- but on the other hand, if
9 documents are going to be exchanged in the future with
10 any -- I think it is obvious with any notion of privacy claims
11 or confidentiality matters, those need to be put before the
12 Court at the outset.

13 MR. YOAKAM: Well, I would request --

14 THE COURT: And then I will rule, but,
15 Mr. Yoakam, you know, when you open up a bag and let a herd of
16 cats out, it is awfully hard to get them all back, and so I
17 have denied your relief. In the future, if matters are -- if
18 we have further instances where documents are sought and there
19 is opposition, then we will take it up. I will rule on them,
20 and if there are requests to limit -- well, to seal documents
21 or limit their dissemination, I will consider the requests as
22 I do always, and I will rule on those requests, but I am not
23 there now.

24 So we will -- but that is a statement that
25 is -- my prospective posture is I will rule on whether matters

1 should be disclosed or -- and then I will consider whatever
2 requests are made to limit dissemination as I do in every case
3 where these issues come up and they are presented to me
4 beforehand.

5 MR. YOAKAM: If I can press Your Honor because I
6 would like some clarification going forward because when I
7 turned that document over, it was clearly in the context of
8 the hearing that was -- that it was being held and that was
9 whether this document could be produced for discovery
10 purposes.

11 THE COURT: I understand that.

12 MR. YOAKAM: And it seems to me that that's
13 what -- at this point, if the Court is not inclined to grant
14 my other relief, at the very least what should happen is no
15 further dissemination except for discovery purposes should be
16 made of the document because that is why I gave it up because
17 it made sense.

18 THE COURT: Mr. Waterman, with respect to
19 further dissemination?

20 MR. WATERMAN: I strenuously disagree on
21 multiple grounds.

22

23 (There was an interruption.)

24

25 MR. WATERMAN: Again, I never would have agreed

1 to averting my motion to enforce the subpoena if it had -- if
2 the tender of my client's health care record had been
3 conditioned on a protective order. Number two, it is not
4 privileged. In fact, it is my client's health care record.
5 *Riverside* is clear.

6 Number three, even if it was privileged, they
7 waived it, and he cannot now, having avoided the merits of
8 determination and waived any arguable privilege, leverage me
9 into a protective order situation which is not --

10 MR. YOAKAM: That is not what I seek.

11 THE COURT: I understand. I am going to rule
12 now. The matter is already out there.

13 Mr. Yoakam, I understand your motion. But it
14 has been disseminated, and a further order would serve no
15 particular purpose in the case, but I made it clear if there
16 are further instances with respect to disclosure of
17 information, whatever information in whatever form, and I am
18 called upon to make a ruling about whether the information can
19 be turned over to counsel, I will rule on that; and if there
20 are requests with respect to the dissemination of that beyond
21 the record in this particular case, I will consider those
22 requests as I always will.

23 MR. YOAKAM: Going forward, Your Honor --

24 THE COURT: I am not going to make advance
25 rulings in the case. I don't think I would have any support

1 in the law about doing that.

2 I again urge counsel if you -- all I can do is
3 say this: Counsel, if you are going to try a case against
4 somebody and part of it is you can't -- you can press your way
5 through a case and litigate and fight every issue.

6 In fact, you can create an issue over every step
7 of the way. It is wasteful of the Court's time, and that is
8 my time, and this is -- frankly, this whole hearing today,
9 further hearings like this are wasteful of the Court's time,
10 your clients' time, and your own time; and we can stick a
11 thumb in each other's eyes every chance we get, and we will
12 finish this case, but that is the whole -- and it is not
13 unethical to stick your thumb in the other person's eye. It
14 goes to another notion, an overarching, noncodified notion of
15 professionalism and getting this case tried efficiently so you
16 can go on to your next client's case.

17 That is -- I am not going to say anymore about
18 it. I am not going to make any advance rulings. I will take
19 each -- other matters up as they come up.

20 MR. YOAKAM: All I want to say at this point is
21 I don't want to appear in Mr. Waterman's blog in any way.
22 Anything we bring up to the Court --

23 THE COURT: Those things are not within the
24 Court's -- those are not within the Court's advance control,
25 and I'm not sure that they're under any particular control by

1 the Court. I don't want to be on anybody's blog, but I'm
2 probably on everybody's blog, and that goes with the territory
3 in my job; and unfortunately, whether you like it or not,
4 these days and times, it goes with the territory of being a
5 lawyer.

6 I am not going to say any more. You will please
7 prepare an order.

8 MR. WATERMAN: Yes, sir.

9 THE COURT: Mr. Yoakam --
10 Submit it to Mr. Yoakam for his objections.
11 -- you may specify your objections in as much
12 detail as you wish.

13 MR. YOAKAM: I have said my piece.

14 THE COURT: And we will proceed on.

15 MR. YOAKAM: The Court knows where my mind is.

16 THE COURT: All right. Thank you very much.

17 MR. WATERMAN: Thank you, Your Honor.

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19 (The proceedings were concluded.)

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C E R T I F I C A T E

STATE OF VIRGINIA
CITY OF SUFFOLK, to wit:

I, Robin L. Delloro, R.P.R., certify that the foregoing is a true and correct transcript of the testimony and proceedings adduced in the case of Thelma E. Mahone, Administratrix of the Estate of Felicia T. Madison, deceased, versus Sentara Hospitals, et al., on February 5, 2010.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties or a relative or employee of such attorney or counsel or financially interested in the action.

Given under my hand this 15th day of February, 2010.

Robin L. Delloro
Robin L. Delloro, R.P.R.