No. 18-465

In the Supreme Court of the United States

SADE GARNETT,

Petitioner,

v.

REMEDI SENIORCARE OF VIRGINIA, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF

Petitioner Sade Garnett, pursuant to Rule 15.8, hereby submits this supplemental brief to advise the Court of the recent Supreme Court of Virginia ("SCV") decision in *Parker v. Carilion Clinic*, Record No. 170132. In *Parker,* the SCV reversed the trial court's dismissal of the plaintiff's complaint against a health-care facility, Carilion Clinic ("Carilion"), on the grounds that the trial court had prematurely concluded at the pleadings stage that Carilion was not vicariously liable for the tortious actions of its individual employees as a matter of law. In doing so, the SCV held that because Parker had alleged in her complaint that the two individual employees had "committed torts in the context of their employment with Carilion," she had thus "created a rebuttable presumption that facts exist (though not specifically pleaded) that would satisfy the 'established test; for vicarious liability: that [the employees] committed tortious acts 'within the scope of [their] duties . . . employment and in the execution of the service for which [they were] engaged." *Parker*, at p. 17-18. As such, it held that it was error for the trial court to dismiss her complaint. Both a copy of the SCV's decision and Parker's underlying complaint are provided in the Appendix to this brief. The SCV issued *Parker* on November 1, 2018, and thus it was unavailable to Petitioner at the time she filed her Petition for Writ of Certiorari on October 9, 2018.

ARGUMENT

PARKER v. CARILION CLINIC BEARS ON THE UNDERLYING PETITION FOR FOUR REASONS

The underlying Petition seeks a writ of certiorari because the Fourth Circuit unilaterally, without notice, and without any briefing on the issue, made an improper vicarious liability holding. Its substantive decision was that despite the fact that Garnett's complaint clearly alleged the existence of an employee/employer relationship between the individual who committed the tortious conduct against her and that individual's employer (the defendant), she could not sufficiently show vicarious liability under Virginia law *as a matter of law* at the Rule 12(b)(6) stage. *Garnett v. Remedi Seniorcare of Va., LLC*, 892 F.3d 140, 146 (4th Cir. 2018). *Parker*, the latest decision from the SCV on the question of vicarious liability in the employment context, proves that the Fourth Circuit's substantive holding on this issue is plainly wrong. *Parker* bears on the underlying Petition for four reasons.

First, *Parker's* fact-pattern is highly analogous to the factual allegations here. In *Parker*, Parker claimed that two Carilion employees accessed her private confidential medical information, discussed the information among themselves, and then disclosed that information – namely, information about a medical condition for which she had been diagnosed – to one of her acquaintances. *Parker*, at 2. While the medical information at issue was accessed by the employees while at work, the dissemination of the private information was in the nature of gossip and, at least on its surface, appeared to have no

connection to the job duties of the individual employee defendants. *Id.* Likewise here, the individual employee of Remedi Seniorcare of Virginia, LLC ("Remedi") learned of what he falsely believed was Garnett's medical treatment for sexually transmitted disease while at work and then, also while at work, communicated this false information to other Remedi employees. *Garnett*, 892 F.3d at 142, 146. And likewise here, at least on the surface, Try's behavior appears to have no connection to his job duties at Remedi.

Second, *Parker's* procedural posture is identical to that presented here. In *Parker*, the trial court dismissed Parker's complaint at the demurrer stage – Virginia's equivalent of the Rule 12(b)(6) stage of the case. In other words, the trial court reached its decision based solely on the allegations in Parker's complaint. Nothing else. Likewise here, the Fourth Circuit held that dismissal was appropriate at the Rule 12(b)(6) stage of the case -- based solely on the allegations in Garnett's Complaint. *Garnett*, 892 F.3d at 146.

Third, *Parker's* outcome – to wit: the reversal of the trial court's dismissal of the complaint at the pleadings stage – is controlling and is precisely what should have happened in this case. In *Parker*, the SCV held that the simple fact that Parker's complaint alleged the existence of an employee/employer relationship was enough to establish Virginia's "rebuttable presumption that facts exist (though not specifically pleaded) that would satisfy the 'established test' for vicarious liability: that [the individual employees at issue] committed tortious acts 'within the scope of [their] duties of . . . employment and in the execution of the service for

which [they were] engaged'" and thus was enough to survive early dismissal. *Parker*, at 17-18 (citations omitted). Indeed, as clearly recognized by two SCV Justices in a concurring opinion: "as a practical matter, it will usually be difficult to rebut the presumption in a demurrer to a well pleaded complaint because no evidence has been adduced then." *Id.* at 28, n.*.

So too here. Garnett, just like Parker, alleged that the individual defendant, Try, committed his tortious conduct while working as an employee of Remedi. As such, Garnett, just like Parker, established the rebuttable presumption that "facts exist (*though not specifically pleaded*) that would satisfy the 'established test' for vicarious liability." *Id.* at 17 (emphasis added). As well, just as in *Parker*, the defendant did not – and could not – adduce any facts capable of rebutting the vicarious liability presumption. Thus, Garnett, just like Parker, should be allowed to proceed with her claim beyond the pleadings stage of the case.

Fourth and finally, *Parker* proves that the Fourth Circuit's holding below on vicarious liability is wrong. Below, the Fourth Circuit said <u>*nothing*</u> about Virginia's presumption in favor of vicarious liability that arises when a plaintiff simply pleads the existence of the employment relationship. Instead, it said that while "Garnett makes much of the fact that Try's comment occurred at work," [t]hat . . . is hardly dispositive." *Garnett*, 892 F.3d at 156. This is wrong. At the pleadings stage, it is *clearly dispositive*! Indeed, in *Parker,* the SCV addressed precisely this concern, recognizing that "[f]acts that come to light later might affirm or disaffirm the presumption." *Parker*, at 18. However, the SCV also clearly

recognized that "none of these factual contests can be addressed *at the pleading stage of the case*." *Id.* at 18-19 (emphasis added).

Here, the Fourth Circuit improperly eschewed Virginia's vicarious liability presumption and inappropriately weighed and analyzed the factual allegations in order to conclude that no vicarious liability existed in this case *at the pleadings stage*. Lest there be any doubt about this, one need only look at how the Fourth Circuit's holding is being viewed by outside observers, one of whom speculated that "the outcome [of *Garnett*] may have turned on pleading failures on the plaintiff's part: She did not present sufficient facts to support her assertion that his misconduct had a nexus to employment, or to establish that the tortfeasor was, in fact, a supervisor."[1] But of course, Garnett was never allowed to present any such facts because of the Fourth Circuit's improper early dismissal. Indeed, these are the kinds of issues that under *Parker* should have been left to later development. The Fourth Circuit was wrong to try to address them based solely on the face of the Complaint.

CONCLUSION

In conclusion, *Parker* supplies irrefutable proof that the Fourth Circuit erred when it concluded that the proper resolution of the vicarious liability question in this case was "beyond any doubt" in favor of Remedi. *Garnett*, 892 F.3d at 142 (quoting *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

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[1] http://www.employmentlawdaily.com/index.php/news/odious-offensive-comments-made-at-work-still-outside-scope-of-employment-no-employer-liability/ (visited on November 20, 2018)

Moreover, because of such error, the Fourth Circuit abused its appellate jurisdiction when it considered the vicarious liability issue for the very first time on appeal and, in turn, violated the rule of law this Court set forth and applied in *Singleton v. Wulff*.

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