IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

KEVIN O. BARKMAN	)	
	)	
Plaintiff,	)	
	)	
v.		**) Case No. C-21-CY-18-643**
	)	
FAHRNEY-KEEDY MEMORIAL HOME, INC	)	
	)	
	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF HER MOTION TO COMPEL

COMES NOW Plaintiff, by counsel, and files this, his Reply Memorandum in Support of her Motion to Compel, and in support thereof, states as follows:

I. Introduction

Despite objecting to most of Plaintiff's discovery requests, Defendant largely ignores specific requests in their Reply, apparently taking the position that their supplemental document production resolves many of their issues. While Defendant did produce some policies, many of the requested policies, even ones requested directly from their own index, have not been produced.[1]

[1] On March 15, 2019, Defendant produced the following policies: Assistive devices and equipment, qualify of life, fall risk assessment, safety and resident supervision, safe lifting and moving of residents. Defendant has previously produced an index of policies for Plaintiff to request specific policies. On February 14, 2019, Plaintiff requested various policies from the index including the attending physician policy and nursing services policy, which Defendant has not produced. It also failed to produce any manufacturing or operational information on the wheelchair they supplied to Plaintiff, even though Plaintiff modified his request to also seek an exemplar, if the original was not available.

Prior to filing this Motion, Defendant never disclosed the existence of witness statements being withheld from production. This was no oversight, as the statements clearly existed and were specifically requested. Defendant chose to violate rule Md. Rule 2-402 (e) which requires a party to "describe the nature of the documents" being withheld and disclose sufficient information to "enable other parties to assess the applicability of the privilege." This Court should not reward such gamesmanship.

II. **Argument**

A. **The Previously Unidentified Witness Statements are Discoverable**.

In their Reply Defendant notes that the two witness statements they are withholding are privileged. (Defendant's Reply at 6). However, Defendant provides no information to support such an objection and fails to include these witness statements on their recently created privilege log.

Defendant's reliance on *Kelch v. Mass Transit Administration,* 400 A.2d 440, 42 Md. App. 291 (1979) is misplaced. In *Kelch* the Court disallowed the discovery of "reports prepared by employees of M.T.A." which were created in anticipation of litigation. *Id*. at 298. The Court distinguished a long line of cases allowing the discovery of statements taken by insurance adjustors, noting that M.T.A. "employed counsel almost immediately after the accident." *Id.* at 302.

The *Kelch* Court also summarized cases which acknowledged that statements taken after an incident, even statements taken by insurance adjustors, "**constitute unique catalysts in the search for truth in the judicial process**; and where the party seeking their discovery was disabled from

making his own investigation at the time, there is sufficient showing under the amended rule to warrant discovery.[2]"(emphasis added).

B. **Even if Such Statements Were Privileged, Plaintiff has a Substantial Need**

Here the decedent, who also had dementia, is not able to explain how the falls at issue occurred. He did tell his sister that the first fall occurred when the staff failed to respond to his call bell, but that information was conveniently omitted from Defendant's chart.[3] As Plaintiff made clear in her Motion, Defendant has purposely created a chart lacking incriminating details, which contains numerous inconsistencies.

Under Plaintiff's theory of the case, Defendant's staff also lied to decedent's sister to cover-up the facts surrounding his last fall, claiming that he had a heart attack which caused the fall.[4] Given the death of Plaintiff's decedent, these statements provide the only source of corroborating information regarding how Plaintiff sustained his multiple falls. As Defendant has made no showing that these statements were taken either by or at the direction of counsel, its privilege objection is misplaced.

Defendant argues that Plaintiff has failed to assert that he is entitled to these statements under the substantial need test. (Defendant's Reply at 5). Its not clear how Plaintiff could have advanced such an argument without first being aware of the existence of these statements. Plaintiff has a

[2] *Id*. at 301, citing *Southern Railway Company v. Lanham*, 403 F.2d 119, 128 reh. denied, 408 F.2d 348 (5th Cir. 1968); *Goosman v. A. Duie Pyle, Inc*, 320 F.2d 45, 50053 (4th Cir. 1963); *Southern Railway Company v. Campbell*, 309 F.2d 569, 572 (5th Cir. 1962); *De Bruce v. Pennsylvania R*, 400 A.2d 447 (D.C. Pa 1947).

[3] Failing to develop the underlying history and analyze the cause of the fall is part of Defendant's standard protocol, which included documentation and communication to the staff of planned interventions.

[4] The recent deposition of the Deputy Medical Examiner further confirms Plaintiff's theory of intentional deceit. Dr. Pamela Southall recently testified that it was Plaintiff's fall at home on October 27, 2015, that was a significant contributing factor to Plaintiff's death. She explained that she was given this information by the nursing home, who contacted her as she was investigating this matter. In fact, the fall that caused Plaintiff's hip fracture occurred in the nursing home, where Plaintiff had been admitted on October 2, 2015.

substantial need to obtain these statements to undertake a proper examination of these witnesses. Given the passage of time and Defendant's attempt to re-write the facts in this case, Plaintiff has zero confidence that these witnesses will truthfully testify to facts that might incriminate this facility. Various Courts have found substantial need where a Plaintiff is either deceased or lacks memory of an incident.[5] The Fourth Circuit has also made it clear that investigative materials prepared in the ordinary course of business pursuant to regulatory requirements for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b(3). *National Union Fire Insurance Company v. Murray Sheet Metal Co. Inc*., 967 F.2d 980 (4th Cir. 1992). While *National Union* involved an industrial accident, the same rationale applies to nursing homes like Fahrney-Keedy, who are statutorily obligated to undertake investigations of incidents involving patient injuries.[6]

C. **Training Materials Are Not Privileged**

Defendant argues that they cannot produce various items of training because of the "privacy privilege." While ignoring case precedents cited by Plaintiff, Defendant fails to cite a single case from any jurisdiction supporting the argument that the "privacy privilege" applies to this production.

[5] *McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972)(Insurance adjustor statements taken in the ordinary course of business, before Plaintiff employed counsel, are not privileged. The 4th Circuit noted the trend in disclosure where statement was not either made to an attorney or at the request of one)(*Phillips v. Dallas Carriers*, 133 F.R.D. 475 (M.D.N.C. 1990)(Defendant driver's statement given to insurer is not protected as attorney work product because even if it qualified as work product, since Plaintiff had no memory of the accident and Defendant is asserting contributory negligence, he demonstrated substantial need).

[6] Pursuant to 42 C.F.R. 483.13 (c)(2). A SNF is required to "ensure that all alleged violations involving mistreatment, neglect or abuse, including injuries of an unknown source. . . are reported to the administrator of the facility and other officials in accordance with State Law . . . (3) The facility must have evidence that all alleged violations are thoroughly investigated. . ."

As a threshold matter, Plaintiff has no objection to the inclusion of such documents in a protective order to address any privacy concerns about the training given to Defendant's staff. As Plaintiff has alleged inadequate training, she should be able to explore this claim in discovery.

Equally important, except for a single document relating to the disciplinary action taken against one staff member, the generic training and orientations provided to staff do not constitute the type of sensitive personnel information that even warrant confidentiality.

D. **Electronic Records**

Defendant suggests that it has produced the requested electronic records in this case. (Defendant's reply at 6). It has not. The chart that was originally produced was never supplemented and an audit trail was never produced. For reasons outlined in Plaintiff's initial Motion, this information should be compelled.

E. **Substantially Similar Complaint and Staffing complaints**

Defendant completely ignores Plaintiff's Motion to Compel information regarding staffing complaints and substantially similar complaints through Document Request Nos 54 and 56. Defendant did produce additional staffing schedules and census information for the days that Plaintiff fell, but not other days, which would allow Plaintiff a basis for comparison. Plaintiff also seeks to compel Document Request No. 42, which seeks to compel complaints in the same care areas alleged to be deficient in Mr. Barkman's care.

F. **The Protective Order**

Defendant suggests to this Court that Plaintiff's failure to agree to a protective order resulted in a delay of document production. Defendant fails to inform the Court that Plaintiff opposed the

version of Defendant's protective order which did not allow the documents to be shown to any witnesses.[7]

G. **Defendant's Responses to Interrogatories & Supplement Discovery**

Defendant does not dispute that Plaintiff is entitled to additional information through supplemental discovery issued on December 6, 2018. (Exh. No. 5 to Plaintiff's Motion to Compel). For reasons that are unclear, Defendant has not even attempted to answer this discovery to date and completely ignores this failure in their Reply. Defendant also ignores their failure to properly answer Interrogatory numbers 2, 3, 4, 5, 11, 12, 15, 16 and 17, as none of these discovery responses are addressed in their reply brief. Absent the assertion of any defense position on these issues, the Court should compel this discovery. *Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005)(Explaining the strong policy reasons for a party raising all existing objections to discovery production with particularity, at the time such discovery is answered).

Wherefore, these and other premises considered, Plaintiff moves this Court for an order compelling full and complete discovery. A proposed order is attached (Exh. No. 1).

Rule1-322.1 and Rule 20-201(h) Certifications

Pursuant to Md. Rule 1-322.1 and Md. Rule 20-201(h), the forgoing submission is in compliance with the above Maryland Rules related to the redaction of personnel or confidential

[7] In recent discussions, defense counsel has agreed to allow the documents to be shown to witnesses but opposes Plaintiff's proposed modification of the protective order which states that the confidentiality of such a document would not be maintained where the document at issue was admitted into evidence during trial. Exh. No. 10 to Plaintiff's Motion to Compel, Plaintiff proposed protective order. It is Plaintiff's position that once a document is admitted into evidence in a public trial, it should no longer be subject to confidentiality. See *Doe v. Blue Cross, Blue Shield,* 103 F.Supp.2d 856 (D. Md. 2000)(Discussing fact that the public has a right to access judicial documents, even those under seal, but allowing a protective order in discovery to address the production of thousands of alleged trade secret documents produced to Plaintiff in discovery).

information. Plaintiff's counsel also affirms that prior to filing the underlying Motion, the Plaintiff made good faith attempts to resolve these discovery disputes, as summarized in her original filing.

Respectfully submitted,
Plaintiff, by counsel,

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CERTIFICATE OF SERVICE

I hereby affirm that on this 19th day of March, 2019, a copy of this Reply with Exhibit was provided to defense counsel of record, by e-mailing (with exhibits) and mailing a copy of this Motion regular mail, postage prepaid, to the following:

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