VIRGINIA: IN THE CIRCUIT COURT OF NOTTOWAY COUNTY

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| Matthew Charles, Henderson, Administrator of the Estate of Charles L. Henderson<br><br>Plaintiff<br><br>**v.**<br><br>Hickory Hill Retirement Community LLC, *et al* d/b/a Hickory Hill Retirement Community<br>900 Cary Road Shop<br>Burkeville, VA 23922<br><br>Defendants. | ) | Law No. CL19-187-00 |

**Plaintiff's Memorandum in Opposition to Defendants' Demurrer on Punitive Damages and Consumer Protection Claims and Motion to Strike All Claims Against Dolores Mullens**

COMES NOW Plaintiff, by counsel, and in response to Defendant's Demurrers on Punitive Damages and Consumer Protection Claims, and Motion to Strike All Claims Against Dolores Mullens, states as follows:

## I. Summary of Argument

Charles Henderson died from complications resulting from severe dehydration, due to the neglect he experienced at Hickory Hill Retirement Community LLC ("Hickory Hills"). His declining condition was never disclosed to the family, who found out about it after he was taken to the VA hospital for a previously scheduled appointment.

While Defendants are free to dispute the facts in litigation, for purposes of these Motions, they are taken as true. As such, their intentional misrepresentations and reckless neglect of Mr.

Henderson during his two-week residence provide more than sufficient evidence to support a punitive claim. Plaintiff has also alleged the staff physically abused Mr. Henderson by holding him down and depriving him of fluids for more than an entire day, resulting in terminal, renal failure. When such allegations are considered in the context of Defendant's abysmal regulatory history, there can be little question that a punitive damage claim has been sufficiently pled.

Similarly, the factual misrepresentations which underlie Plaintiff's admission, support a consumer protection claim under Virginia's remedial Consumer Protection Act (VCPA). Defendant's memorandum of law fails to disclose various Virginia Courts which have upheld such claims against assisted living facilities and nursing homes.

Finally, in seeking to dismiss Administrator Mullens from this case as an individual, Defendants ignore Virginia Supreme Court precedent to the contrary, which they also failed to disclose to this Court. Where corporate officers participate in the underlying torts, they can be joined as party Defendants.

## II. Argument

### A. The Standard for a Demurrer

Due to the preliminary nature of the demurrer, the Supreme Court of Virginia has expressed a desire that trial courts refrain from incorrectly "short-circuit[ing] litigation pretrial." *Catercrop, Inc. v. Catering Concepts, Inc*., 246 Va. 22, 24, 431 S.E.2d 277 (1993) (quoting *Renner v. Stafford,* 245 Va. 351, 352, 429 S.E.2d 218 (1993)). Since a demurrer goes to the whole pleading to which it is addressed, **it should be overruled if any part of the pleading is good in substance.** *See Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S.E. 991 (1905) (emphasis added).

Virginia is a notice pleading state. "Even a flawed complaint will survive demurrer if it is drafted so that the defendant is on notice of the nature and character of the claim."[1] The Supreme Court has upheld a negligence pleading to be sufficient where it alleged that the defendant's actions "proximately caused injury to the plaintiff, both mental and physical." *Moore v. Jefferson Hospital Inc.* 208 Va. 438, 439, 158 S.E.2d 124, 126-27 (1967)(Reversing the ruling of trial court, which found that plaintiff had not stated a cause of action for a tort alleging intentional infliction of emotional distress).

### 1. Plaintiff Pled that Defendants Recklessly Ignored Mr. Henderson's Needs For Hydration Despite His Known Risks

In *Booth v. Robertson*, the Virginia Supreme Court held that punitive damages are warranted not only by malicious conduct, but also by "negligence which is so willful or wanton as to evince a conscious disregard of the rights of others." 236 Va. 269, 273, 374 S.E.2d 1, 3 (1988)(emphasis added). "Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, **with the defendant aware**, from his knowledge of existing circumstances and conditions, **that his conduct probably would cause injury** to another." *Infant C. v. Boy Scouts of America, Inc.*, 239 Va. 572, 581–82, 391 S.E.2d 322, 327 (1990)(emphasis added). Whether an action rises to a level deemed willful or wanton is largely a fact-specific inquiry. *Alfonso v. Robinson*, 257 Va. 540, 545, 514 S.E.2d 615 (1999). If reasonable persons, upon the facts presented, could differ

1*Lodal v. Verizon Va. Inc*, 74 Va. Cir. 110, 112 (Fairfax Cir. Ct. 2007), citing *Cetercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993); *Boy Blue Inc. v. Brown*, 74 Va. Cir. 4, 14, 2007 Va. Cir. Lexis 165 (Essex Co. Cir. Ct. 2007)(Holding that in order to withstand demurrer, notice pleading requires only allegations sufficient to inform defendants of the nature and character of the claim being made without the necessity of having to provide details).

regarding whether the Defendant's conducts show a conscious disregard of the rights of others, a jury question is presented. *Huffman v. Love*, 245 Va. 311, 314 427 S.E.2d 357, 360 (1993).

Ignoring the robust facts Plaintiff has pled in support of punitive damages, Defendants argue that "the best that can be said is that the Complaint sets forth claims of simple negligence." (Defendant's Mem. at p. 3). They are wrong.

Plaintiff alleges that Defendants were aware that Mr. Henderson, who was demented, was vulnerable to dehydration upon admission. (Complaint, ¶ 10). Despite "not consuming fluids for extended periods (at one point an entire day), the staff recklessly disregarded Mr. Henderson's rights to be evaluated and treated by other healthcare providers." *Id*., ¶ 45. "By the time he was removed to the VA Hospital by his son on August 10, 2017, he was terminal because of his extensive kidney damage." *Id*.

Plaintiff also alleges intentional conduct including physical abuse in the form of holding Mr. Henderson down to provide care. *Id*. ¶ 25(d). Defendants "intentionally misrepresented various facts to the Plaintiff and his family in an effort to induce them into HHRC." *Id.,* ¶ 30. Defendants were cited by their licensing authority for various violations in their mistreatment of Mr. Henderson.[2] Given Defendant's past "history of non-compliance with basic regulatory standards, Defendant's management staff knew or should have known that HHRC was not suited for residents with high acuity or who had potential behavior problems. Defendants' management, in an effort to generate increased revenues and providers, intentionally admitted high acuity residents who were beyond the care abilities of their staff." *Id.*, ¶ 49.

2 Defendants were cited for failing to have a service plan for Mr. Henderson, for failing to assume general responsibility for the health, safety and welfare of Mr. Henderson, for failing to notify Mr. Henderson's physician of changes in his behaviors and for failing to reassess him for alternative placement. Complaint, ¶ 23.

Even without the additional allegations involving lack of staffing, prior history of regulatory violations and physical abuse, Plaintiff has stated a claim for punitive damages based on the reckless disregard of Mr. Henderson's hydration needs. Courts in Virginia have allowed punitive damages to go forward under far less egregious circumstances.[3]

Given Mr. Henderson's dementia, he was completely reliant on the staff for his daily care. Here, a jury could easily conclude that Defendants improperly trained staff repeatedly ignored Mr. Henderson's needs for hydration until they caused irreparable kidney damage. Like the Defendant driver who failed to put safety flare's behind in truck in *Alfonso,* or the landlord in *Kaufmann* who cut off the Plaintiff's electricity despite her frail health, Defendants knew that their omissions would likely cause harm to this vulnerable patient.

**2. Plaintiff Alleges that Defendants Were Aware of Significant Deficiencies** in **Staffing and Staff Training, Which Put Them on Notice That High Acuity Residents, including Mr. Henderson, Were Being Placed at Risk.**

In this case a jury could reasonably conclude that Defendants admitted Mr. Henderson despite not having the properly trained staff to provide the high-level attention he required. It is certainly foreseeable that placing an untrained staff member on the front lines in caring for a cognitively impaired, high acuity patient, while ignoring his needs for hydration, would likely cause harm.

3 See *Alfonso v. Robinson*, 257 Va. 540, 514 S.E.2d 615 (1999) (punitive damages allowed where Defendants failed to place safety flares behind a disabled truck); *Kaufmann v. Abramson*, 363 F.2d 865 (4th Cir. 1966) (sustained an award of punitive damages, under Virginia law, for a landlord cutting off a lessee's electricity despite his awareness of elderly lessee's frail health*); Larsen v. Cannon/Hearthwood, L.P. et. al.*, 65 Va. Cir. 505 (2004)(punitive claim survived demurrer where the tenant was injured as a result of the landlord's placement of a defective ladder and the landlord's failure to warn of the dangerous condition of the ladder.)

In Virginia, lack of adequate staff training in the face of a patient's known medical needs has been found to support a punitive damage claim in the long term care setting. A similar result was reached in *Cabiness v. Medical Facilities of America VIII(8) Ltd. Partnership,* 80 Va. Cir. 425 (2010) where Plaintiff claimed punitive damages for a staff members improper insertion of a PEG tube. Defendant's filed a demurrer arguing that the failure to insert the tube was only simple negligence. The trial court held that punitive damages was supported by Plaintiff's allegations that Defendant failed to provide proper staff training to address Plaintiff's known medical needs involving a PEG tube. Here, Defendants conduct was more reckless than *Cabiness*, as they not only admitted a high acuity patient despite the lack of a properly trained staff, but they also ignored his hydration needs despite being put on notice of this condition.

### 3. Allegations Relating to Defendants' History of Similar Regulatory Violations Provides an Additional Basis for Upholding Punitive Damages

Plaintiff also pled that Defendants should have known that given their record involving licensing deficiencies, that they lacked sufficient staffing "to monitor [Mr. Henderson] and keep him hydrated on a daily basis." Complaint, ¶ 50. Many of Defendant's licensure deficiencies, "especially those related to staff training and lack of proper service planning," were "substantially similar to the neglect experienced by Mr. Henderson." Id, ¶ 48. In short, because of prior similar neglect of other patients, Defendants knew better.

In *Crouse v. Medical Facilities of America,* Law No. 09002319 (Roanoke City Cir. Ct. 2013) the Court found that Plaintiff's punitive damage award involving a nursing home fall should be upheld, in part, upon Department of Health deficiencies for which the Court took judicial notice. (Exh. No. 1 at pp. 11-13).[4] Knowledge of the improper use of safety alarms in

4 Although this was a Virginia trial court decision, Defendant's attempted writ to the Supreme Court was denied.

other facilities (within the same nursing home chain) was imputed to Defendant in *Crouse*. The Court found that Defendant ratified such acts for punitive damage purposes based upon their instructions and training to the staff. Here, Plaintiff has alleged ratification through both direct action of the management staff and indirectly by failing to correct repeated instances of resident neglect. (Complaint ¶ 52).

### B. Plaintiff Has Stated a Viable Cause of Action for Violations of Virginia's Consumer Protection Act

Knowing that Plaintiff required a high level of care, Defendants factually misrepresented, *inter alia*, that they provided specialized care for dementia patients, with a specialized team of trained nurses, with 24 hour a day health oversight. (Complaint, ¶ ¶ 17 & 32). Under Plaintiff's theory of the case, the staff lacked adequate training and oversight to provide basic hydration or address Mr. Henderson's demented behaviors. Lacking proper oversight, a doctor was never informed of this change in condition, as verified by their licensing authority's deficiency citation. (Exh. No. 2).

#### 1. Defendants Ignore Virginia Precedent Establishing the Viability Of VCPA case Under Similar Factual Allegations

Defendants appear to argue that since Virginia regulations mandate training, a separate cause of action under the VCPA is effectively preempted. Defendants cite no legal authority for this proposition and fail to inform the Court of Virginia precedent that flatly contravenes their position. While they appear to argue that all medical malpractice is preempted by the Virginia Medical Malpractice Act, Defendants conveniently ignore *Alcoy v. Valley Nursing Home*, Inc. 272 Va. 37, 43, 630 S.E.2d 301, 304(2006)(Holding that a long term care facility's administrative, personnel, security and staffing decisions are not "health care" for purposes of Virginia's medical malpractice act).

In *Beaty v. Manor Care, Inc.*, the United States District Court for the Eastern District of Virginia found that a VCPA claim was stated against an assisted living facility that failed to protect a resident from an assault.[5] 2003 WL 24902409 (E.D. Va. 2003)(Exh. No. 3). In *Beaty*, Defendants made the same arguments that Defendants make here: that as an assisted-living facility regulated by the Virginia Department of Social Services, it is exempt from the VCPA under *Va. Code § 59.1-199(A).*[6]. The *Beaty* Court held that while *Va. § 59.1-199(A)* exempts claims arising from certain transactions that are already covered by Virginia or Federal law, it did not exempt entire industries from the VCPA. *Id.*

Similar to the instant case, the Plaintiff in *Beaty* alleged misrepresentations involving a highly trained staff (to care for Alzheimer's patient), 24-hour supervision and high staffing ratios. The Court noted that while Virginia law addressed the requirement of adequate staffing under *Va. Code* § 63.1-174[7], it did not cover the misrepresentations that formed the basis for Plaintiff's VCPA claims.

A similar result was reached in *McCaulley v. Purdue Pharma*, where Defendants argued that medical providers could not be covered under the VCPA. 172 F.Supp.2d 803 (W.D. Va. 2001). The Plaintiff in *McCaulley* had alleged that a physician made misrepresentations regarding the prescription medication Oxycontin. Despite a highly regulated pharmaceutical industry and allegations involving an actual healthcare provider, the Court found that Plaintiff had stated a valid

5 Mr. Beaty had a history of wandering and allegedly suffered a hip fracture when he was assaulted by another resident who had a history of violence.

6 Va. Code § 59.1-199 (A) states that any aspect of a consumer transaction which aspect is authorized under the laws or regulations of this commonwealth or the United States, or the federal advisory opinions or any body or official of this commonwealth or the United States.

7 Va. Code 63.1-174 has been replaced by Va. Code § 63.2-1803. Section E of the updated code provides that "[t]he assisted living facility shall have adequate, appropriate and sufficient staff to provide services to attain and maintain (i) the physical, mental and psychosocial well-being of each resident as determined by the resident assessments and individual plans of care and (ii) the physical safety of the residents on the premises. Upon

cause of action under the VCPA. The *McCaulley* Court also distinguished *Ott v. Baker*, often relied upon by the defense. 53 Va. Cir. 113 (Norfolk, 2000). *Ott* addressed the licensing of a hospital and legality of an abortion, both of which were governed by other Virginia laws. The Court noted that there was no Virginia law authorizing physicians to make misleading misrepresentations about prescribed drugs and as such, these claims were not excluded from VCPA coverage.

In *Humphrey v. Leewood Healthcare Center*, Plaintiff pursued a VCPA claim based on Plaintiff's elopement from a skilled nursing facility. 73 Va. Cir. 346 (Fairfax 2007)(Exh. No. 4 ). The Court found that nursing home care could constitute a service, sufficient to bring it under the scope of the VCPA[8]. The Court also found Plaintiff's claim was not barred because of nursing home regulations that authorized the conduct at issue, including the Virginia Medical Malpractice Act.

Finally, in *Corrales v. HHC Poplar Springs, Inc*, Judge Teefey in Petersburg overruled Defendant's Demurrer where Plaintiff had alleged consumer protection violations involving safety and risk management at a mental health facility. Law No. CL 15000378 (Cir. Ct. Peterburg, 2015)(Exh. No. 5). The Court expressly rejected the argument that claim was preempted by Virginia's medical malpractice act. *Id*. at p. 5.

Consistent with the liberal application of consumer protection statutes, courts from other jurisdictions have found claims involving nursing care or long-term care services to be covered under their state's consumer protection acts. *See Ikuno v. Yip*, 912 F.2d 306, 312 (9th Cir. 1990) (holding that "both the practice of law and medicine may give rise to CPA [Consumer Protection Act] claims"); *Dorn v. McTigue*, 157 F. Supp. 2d 37 (D.D.C. 2001) (holding that the District of

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admission and upon request, the assisted living facility shall provide in writing a description of the types of staff working in the facility and the services provided, including the hours such services are available."

8 Defendants do not even argue that the transaction involving Plaintiff's inducement to enter into a contract with Defendant assisted living facility is not a commercial transaction under the VCPA. If such an argument is later advanced, it must fail given the broad scope of VCPA, as applying to personal services.

Columbia Consumer Procedures and Protection Act applied to health care providers if plaintiff satisfied the threshold requirements of the Act); *Chalfin v. Beverly Enter.*, 741 F. Supp. 1162, *reconsideration denied*, 745 F. Supp. 1117 (E.D. Pa. 1989) (holding that health care services provided by a nursing home were within the scope of the Pennsylvania unfair trade practices and consumer protection laws).

2. **Plaintiff's Factual Allegations Are Sufficient to Support a VCPA Claim**

As a preliminary matter, Defendants' Demurrer improperly draws upon pleading requirements applicable to common law fraud suits[9], even though Count II is expressly brought pursuant to the VCPA. When considering Defendants' Demurrer, it is important to recognize that a cause of action for deceptive practices under the VCPA is analytically distinct from a common law fraud action, both substantively and procedurally. *See, e.g.*, *Ballagh v. Fauber Enterprises, Inc.*, 290 Va. 120, 124 (2015) (holding that "The VCPA creates a new, statutory cause of action that is distinct from and in addition to common law fraud."). As the Court explained in *Owens v. DRS Automotive Fantomworks, Inc*., 288 Va. 489 (2014), a claim under the VCPA is not the same as a common law fraud claim:

> Proof of fraud in a consumer transaction is alone sufficient to establish a violation of the VCPA, **but the legislative purpose underlying the VCPA was, in large part, to expand the remedies afforded to consumers and to relax the restrictions imposed upon them by the common law. That remedial purpose would be nullified by an interpretation of the VCPA that construed it as merely declarative of the common law**…. Therefore, we agree with the plaintiffs' argument that the VCPA's proscription of conduct by suppliers in consumer transactions **extends considerably beyond fraud**.

9 Defendants cite *Salves v. Kecoughtan Housing Company* in support of their position that an action based on fraud may not be based on an unfulfilled promise or statement of future events. 279 Va. 475 (2010). This case was not construing the VCPA.

*Id*. at 497 (emphasis added). Because the causes of action are different, there are procedural differences between the two theories of recovery. For example, the burden of proof in a VCPA suit is preponderance of the evidence, and not the fraud standard of clear and convincing evidence. *Ballagh*, 290 Va. at 124-125. Another difference is that actionable misrepresentations under the VCPA need not be pleaded with the same degree of specificity as their common law fraud counterparts. *See, e.g., Patten v. Chrysler Corp.,* 1997 WL 1070537, *2 (Va. Cir. Ct.1997); *554 *Debrew v. Lexus,* 1997 WL 1070613, *2 (Va. Cir. Ct.1997).[10] Representations are also fraudulent when they are made without a present intention to insure their truth. *Colonial Ford. V. Schneider*, 228 Va. 671, 677 (1985). In addition, false statements about present quality or character, although expressed as opinion are fraudulent. *Tate v. Colonial House Builders, Inc*. 257 Va. 78, 83-84, 508 S.E.2d 597, 600 (1999)(Statements that house was free from structural defects was representation about the present quality or character of the property).

Without discussing the specific allegations of misrepresentation, Defendants argue that Plaintiff's allegations involving misrepresentation are premised on opinion and puffery, not fact. (Defendant's Mem. at p. 5). Plaintiff's allegations include, *inter alia*, the following:

- Specialized care for dementia and Alzheimer's patients (Complaint, ¶ 17)
- Our specialized team of trained nurses . . . providing professionalism in personal care, health care, activities . . . *Id*.
- RN and LPNs. . . a full complement of personal care services including medication management and health oversight – 24 hrs." (complaint, ¶ 32).

In short, Defendant misrepresented that they had a specially trained staff, 24 hours a day,

10. The specificity requirement does not apply to a VCPA cause of action. *Patten v. Chrysler Corp,* 1997 WL 1070537, *2 (Va. Cir. Ct.1997); *Debrew v. Lexus,* 1997 WL 1070613, *2 (Va. Cir. *554 Ct.1997).

which staff was capable of handling difficult and demented patients like Mr. Henderson. These factual misrepresentations, which induced Plaintiff into the facility, go to the heart of why Plaintiff was neglected in this case.

These alleged misrepresentations are strikingly similar to the misrepresentations in *Beaty*, which the Court found to be sufficiently factual to support Plaintiff's VCPA claim. The *Beaty* Court relied upon the Virginia Supreme Court decision of *Packard Norfolk Inc. v. Miller*, which held that the Court must take into account "the meaning of the language used as applied to the subject matter and as interpreted by the surrounding circumstances." 198 Va. At 557, 562, 95 S.E.2d at 207, 211(1956).

> Plaintiffs were looking for a place to put an 83 year old man with Alzheimers, who had a propensity for wandering at night. Defendants' representations, in response to Plaintiffs' inquiries, took on the meaning inherent from the circumstances. Accordingly, Defendants' assurances regarding the ability to take care of the special needs of Alzheimer's patients, specifically Mr. Beaty, are particularly persuasive. Plaintiffs were looking for assurances that the facility would be able to respond to Mr. Beaty's specific needs, and therefore their responses were more than general opinions.

*Beaty*, Exh. No. 3 at p. 8.

Like Beaty, Plaintiff's were looking for a facility that could address Mr. Henderson's needs for frequent hydration as his dementia would often prevent him from realizing when he needed water. When the alleged misrepresentations in the case at bar are considered in this context, in combination with additional specific factual misrepresentations, there is even a strong basis supporting Plaintiff VCPA claim, as compared to *Beaty*.

### C. Defendant's Motion to Strike Allegations Involving Dolores Mullens Must be Denied

Plaintiff alleges that Dolores V. Mullens was partial owner and administrator of HHRC.

Complaint, ¶ 3. "Dolores V. Mullens independently breached applicable standards of care by failing to properly train her staff, by failing to provide proper instructions and protocols for staff when she was absent from the building and by failing to assure that Mr. Henderson received the care and treatment he needed while at HHRC. . . Ms. Mullens also failed to properly assess and respond to the dehydrated condition of Mr. Henderson upon her return from vacation." Id, ¶ 24.

Defendants argue that no manager or agent of a limited liability company can be included as a party **solely by reason of being a member**, citing Section 13.1020 of the Virginia Lability liability act. (emphasis added). However, as made clear by the complaint, Administrator Mullens is alleged to have breached independent duties that go to the heart of Plaintiff's neglect case against HHRC. In short, her direct participation in the conduct at issue renders her liable.

The Supreme Court has made clear the Virginia Limited Liability Act does not prevent direct actions against those officers or agents who played a key role in the company's tortious conduct. *Lockhart v. Commonwealth Educ Sys. Corp*., 247 Va. 98, 439 S.E.2d 328 (1994)(Employees wrongful discharge claim allowed to proceed against both the corporate entity and individual supervisor who made termination decision); *Mcfarland v. Virginia Retirement Services*, 477 F.Supp.2d 727 (E.D. Va 2007)(Noting deference to Virginia Supreme Court decisions to allow direct claims against officers or agents who played a key role in the wrongful conduct); See also, *Dudley v. Estate Life Ins,* 220 Va. 343 (1979)(Principal who puts agent in a position to commit fraud on a third person is subject to liability even though principal was innocent).

Here, Ms. Mullens is alleged to have been Administrator of the facility, who "independently breached applicable standards of care" leading to numerous licensure citations against her facility, relating to the neglect of Mr. Henderson. While she clearly had two roles,

the fact that she was also an officer of a limited liability company cannot provide immunity for her separate torts. To do so, would interject reversible error into this case.

Wherefore, these and other premises considered, Plaintiff moves this Court for an order overruling Defendants' demurrers and denying all outstanding Motions.

Dated: August 9, 2019

Respectfully submitted,
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**CERTIFICATE OF MAILING**

I hereby certify that a true copy of the foregoing Plaintiff's Opposition to Defendant's Demurrers and Motion to Strike all claims against Dolores Mullens, with notice of hearing, was served upon Defendants, by sending a copy of this Memorandum, with attachments, postage prepaid, this 8 th day of August, 2019, to the following:

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