

VIRGINIA:

IN THE CIRCUIT COURT FOR NOTTOWAY COUNTY

MATTHEW CHARLES HENDERSON, Administrator)
Of the Estate of Charles L. Henderson,)

Plaintiff)

v.)

HICKORY HILL RETIREMENT COMMUNITY,)
LLC d/b/a Hickory Hill Retirement Community, et al.,)

Defendants.)

Case No. CL19-000187-00

ORDER ON SEPTEMBER 23, 2019 MOTIONS HEARING

THIS MATTER was before the Court on the following motions filed and argued by
Hickory Hill Retirement Community, LLC and Dolores V. Mullens:

1. Motion to Strike All Claims Against Dolores V. Mullens in Her Capacity as a Member
of Hickory Hill Retirement Community, LLC;
2. Motion Craving Oyer;
3. Motion to Strike Inflammatory Misrepresentations;
4. Demurrer to Punitive Damages; and
5. Demurrer to Claims Under the Virginia Consumer Protection Act.

Based on the briefs filed with this court and the oral argument on September 23, 2019, a
transcript of which is attached hereto, the Court **ORDERS** as follows:

1. The Motion to Strike All Claims Against Dolores V. Mullens in Her Capacity as a
Member of Hickory Hill Retirement Community, LLC is **GRANTED** to the extent that Plaintiff
may have sought to hold her liable solely because she is an owner, member, or manager of Hickory

Hill Retirement Community, LLC. and Plaintiff shall be allowed to pursue claims against Ms. Mullens only to the extent that direct action on her part is alleged.

2. The Motion Craving Oyer is **DENIED** because the court considers the motion unnecessary based on the plaintiff having produced in discovery the sales brochure in issue and on the fact that the parties do not disagree on the accuracy of the quotes taken from the brochure and included in the Complaint.

3. The Motion to Strike Inflammatory Misrepresentations is **DENIED** and Defendants are granted leave to raise these issues in motions in limine before trial.

4. The demurrer to the punitive damages claim is **DENIED** because the court believes that the allegation that the facility admitted the resident when it knew it was not properly staffed is sufficient to plead the willful and wanton conduct that is required for a punitive damages claim, that this issue should not be decided on demurrer, and that the question of whether evidence is sufficient to establish a punitive damages claim should be submitted to a jury. The court also finds that by alleging that ratification or authorization occurred, Plaintiff's allegations are sufficient to survive demurrer.

5. The demurrer to the Virginia Consumer Protection Act ("VCPA") claim is **DENIED** because §59.1-199 of the Code of Virginia does not exempt assisted living facilities in their advertising, regardless of the advertising provision for assisted living facilities found in §63.2-1899(B) of the Code of Virginia that allows assisted living facilities to describe the services they provide. The court further finds that the Complaint contains sufficient allegations of fact to withstand a demurrer on the issue of whether the advertising constitutes factual misrepresentations or sales trade talk or puffery.

The rationale of this court is contained in its October 2, 2019 letter opinion attached to this Order.

The Clerk of the Court is directed to send certified copies of this Order to counsel of record.

ENTER this 1 day of November 2019.

Paul W. Collier

CIRCUIT COURT JUDGE

WITH THE EXCEPTION OF THE FIRST RULING,
THESE RULINGS ARE OBJECTED TO
FOR ALL OF THE REASONS SET FORTH
ON BRIEF AND IN ORAL ARGUMENT AS
REFLECTED IN THE TRANSCRIPT ATTACHED
HERETO:

Nancy F. Reynolds

Nancy F. Reynolds, Esq. (VSB # 38236)
Woods Rogers, PLC
P.O. Box 14125
Roanoke, Virginia 24038
(540) 983-7605
nreynolds@woodsrogers.com
Counsel for Defendants

Seen and objected to as to all adverse rulings for the reasons set forth in Plaintiff's legal memoranda and oral argument.

Jeffrey J. Downey

Jeffrey J. Downey, Esq. (VSB# 31992)
Law Office of Jeffrey J. Downey, P.C.
8270 Greensboro Drive, Suite 810
McLean, VA 22102
703-564-7318
jdowney@jeffdowney.com
Counsel for plaintiff

NOTTOWAY CIRCUIT CT.

A Copy, Teste: Jane L. Brown, Clerk

By Jane L. Brown p.c.

ELEVENTH JUDICIAL CIRCUIT

PAUL W. CELLA, JUDGE
POWHATAN COUNTY COURTHOUSE
3980-C OLD BUCKINGHAM ROAD
POWHATAN, VIRGINIA 23139
TELEPHONE (804) 598-5664
TELECOPIER (804) 598-1340



COMMONWEALTH OF VIRGINIA

CIRCUIT COURT OF AMELIA COUNTY
CIRCUIT COURT OF DINWIDDIE COUNTY
CIRCUIT COURT OF NOTTOWAY COUNTY
CIRCUIT COURT OF THE CITY OF PETERSBURG
CIRCUIT COURT OF POWHATAN COUNTY

October 2, 2019

Jeffrey J. Downey, Esq.
8270 Greensboro Drive, Suite 810
McLean, Virginia 22102

Nancy F. Reynolds, Esq.
Woods Rogers, PLC
Post Office Box 14125
Roanoke, Virginia 24038

Henderson v. Hickory Hill Retirement Community, LLC
Nottoway Circuit Court Case Number CL19-187

Dear Mr. Downey and Ms. Reynolds:

I am writing in regard to the hearing that was held September 23, 2019.

Defendants' Plea in Bar as to Countryside Estates, LLC

At the hearing, the parties submitted an agreed order dismissing the case as to defendant Countryside Estates, LLC (Countryside), and I entered this order. Under separate cover, the Clerk's Office will mail copies to you.

Motion to Strike All Claims against Dolores V. Mullens in Her Capacity
as a Member of Hickory Hill Retirement Community, LLC

Based on Virginia Code §13.1-1019 and Virginia Code §13.1-1020, defendant Dolores V. Mullens (Mullens) argues that I should strike all claims that plaintiff, Matthew Charles Henderson, has filed against her except to the extent that those claims relate to direct acts on her part.¹ In other words, she argues that I should strike all of plaintiff's claims against her to the extent that plaintiff is seeking to hold her liable solely as an owner, member, or manager of defendant Hickory Hill Retirement Community, LLC (Hickory Hill). If I understand plaintiff's position correctly, he does not disagree with this argument. For example, on page 13 of his Memorandum in Opposition, plaintiff says that he is pursuing Mullens based on "her direct participation in the conduct at issue," such as failing to train her staff properly. Therefore, my decision is that plaintiff shall be allowed to pursue claims against Mullens only to the extent that

¹ Matthew Charles Henderson is plaintiff in his capacity as administrator of Charles L. Henderson.

Jeffrey J. Downey, Esq.
Nancy F. Reynolds, Esq.
October 2, 2019
Page two

direct action on her part is alleged. In other words, Mullens's motion to strike is granted to the extent that plaintiff may have sought to hold her liable solely because she is an owner, member, or manager of Hickory Hill.

Defendants' Motion Craving Oyer

Defendants crave oyer as to the sales brochure that is referred to in paragraph 17 of plaintiff's Complaint. Defendants argue that this request is justified because this document is pertinent to defendants' demurrer regarding plaintiff's claim under the Virginia Consumer Protection Act (VCPA).² At the hearing, Mr. Downey said that he has produced the document to Ms. Reynolds, and he argued that in light of that fact, and in light of the fact that the specific language upon which plaintiff relies is quoted in the Complaint, a motion craving oyer is unnecessary.

A motion craving oyer is used to force a party to file with the court documents that are mentioned in a party's complaint but that are not attached to the complaint. When the court rules on a demurrer, the court can then consider both the facts alleged in the complaint and the facts stated in the document. If the facts stated in the document support the allegations in the complaint, the court may consider that, and if the facts stated in the document contradict the allegations in the complaint, the court may consider that too. Ward's Equipment, Inc. v. New Holland North America, Inc., 254 Va. 379, 493 S.E.2d 516 (1997).

I believe that Mr. Downey is correct in stating that on the facts of our case, a motion craving oyer is unnecessary. The sales brochure has been produced to defendants, its contents do not appear to be in dispute, and the statements upon which plaintiff relies are quoted in the Complaint. Defendants' demurrer to plaintiff's claim under the VCPA does not argue that the brochure has been misquoted or that there are additional parts of it that I need to see in order to make a proper ruling. Rather, in their demurrer to plaintiff's claim under the VCPA, defendants argue that (1) the VCPA does not apply to assisted living facilities, and (2) the statements in the sales brochure are not fraudulent.

For the reasons stated above, defendants' motion craving oyer is denied.

Defendants' Motion to Strike Inflammatory Misrepresentations

Paragraph 48 of plaintiff's Complaint alleges that defendants' licensing agency cited defendants for certain violations before Charles L. Henderson became a resident at Hickory Hill.

² Defendants' Motion Craving Oyer also refers to any agreements regarding an alleged joint venture among Countryside, Hickory Hill, and Mullens, but this was not argued at the hearing. I assume that this alleged joint venture is moot because of the dismissal of Countryside and the clarification of the scope of plaintiff's claims against Mullens, as discussed above. If I am mistaken, please let me know.

Jeffrey J. Downey, Esq.
Nancy F. Reynolds, Esq.
October 2, 2019
Page three

In their Answer, defendants deny this allegation. In their Motion to Strike Inflammatory Misrepresentations, defendants argue that these allegations are "verifiably incorrect" (Motion to Strike Inflammatory Misrepresentations at 5) and ask me to strike them.

As I suggested in one of my questions at the hearing, while I understand defendants' position, I believe that this is an issue that should more properly be decided as part of a motion in limine after discovery has been conducted. If discovery reveals that these allegations are unfounded, then they can be excluded at trial. I am reluctant, however, to strike these allegations at the pleading stage. Therefore, this motion is overruled, without prejudice to defendants' right to raise it again later in the case, after discovery has been conducted.

Defendants' Demurrer to Punitive Damages Claim

Defendants argue that plaintiff's claim for punitive damages should be dismissed because "[w]illful and wanton negligence is required for an award of punitive damages," and the "best that can be said is that the Complaint sets for claims of simple negligence," which are insufficient for such an award. (Defendants' Memorandum in Support of Demurrer to Punitive Damages Claim at 3.) Plaintiff argues that his allegations to the effect that Hickory Hill knowingly admitted Charles L. Henderson as a resident when it knew that it was not properly staffed to care for him are sufficient to plead the willful and wanton conduct that is required for an award of punitive damages. I believe that it would be premature for me to decide this issue on a demurrer. I believe that plaintiff should be given an opportunity to present his evidence, and then a decision can be made as to whether the evidence is sufficient for his claim of punitive damages to be submitted to the jury.

I realize that part of defendants' argument is that in order for Hickory Hill to be held liable for punitive damages, plaintiff must prove that Hickory Hill ratified or authorized the offending acts of its employees. Plaintiff has alleged that such ratification or authorization occurred. (Complaint ¶52.) Once again, I am reluctant to decide this issue at the pleading stage. I believe that plaintiff should be given an opportunity to present evidence, and then a decision can be made.

For the reasons stated above, defendants' demurrer to plaintiff's claim for punitive damages is overruled.

Defendants' Demurrer to Claims under the VCPA

Plaintiff alleges that defendants made fraudulent misrepresentations that were calculated to lure Charles L. Henderson into coming to Hickory Hill when Hickory Hill was not able to take care of him properly, and that this violated the VCPA. As noted above, defendants make two arguments. First, defendants argue that the VCPA does not apply to assisted living facilities.

Jeffrey J. Downey, Esq.
Nancy F. Reynolds, Esq.
October 2, 2019
Page four

Second, defendants argue that the statements that were allegedly made constitute "sales trade talk or puffery and are not fraudulent statements." (Defendants' Memorandum in Support of Demurrers to Consumer Protection Act Claims at 5.)

The Supreme Court of Virginia has not ruled on whether the VCPA applies to assisted living facilities. Based on Virginia Code §59.1-199, defendants argue that it does not. That Code section exempts from the VCPA "[a]ny aspect of a consumer transaction which aspect is authorized under laws and regulations of this Commonwealth." Defendants argue that the Social Services chapter of the Code authorizes assisted living facilities to do certain things, such as advertising (Virginia Code §63.2-1800 (B)), and that that, in effect, preempts claims under the VCPA. Citing various cases that he believes to be persuasive, plaintiff disagrees. For example, in Beaty v. Manor Care, Inc. (Civil Action No. 02-1720-A, E.D. Va. February 10, 2003), plaintiffs alleged that an assisted living facility's brochure made certain misrepresentations, and defendants made the same argument that the defendants in our case are making. The court rejected the defendants' argument, noting that Virginia Code §59.1-199 does not exempt entire industries from the VCPA, and that the VCPA did not regulate the type of misrepresentations that the plaintiffs had alleged. See also Humphrey v. Leewood Healthcare Center, 73 Va. Cir. 346 (Fairfax 2007) (claim against nursing home under VCPA not exempted under Virginia Code §59.1-199 because that Code section does not exempt entire industries from the VCPA, and nursing homes are not authorized to misrepresent the level of care that they are able to provide).

I acknowledge that the cases that plaintiff relies on are not controlling authority. In the absence of precedents from the Supreme Court of Virginia, however, I find the rationale of Beaty and Humphrey to be persuasive. I do not believe that Virginia Code §59.1-199 was intended to have the preemptive effect that defendants have ascribed to it.

I understand defendants' position regarding "sales trade talk or puffery," but I believe that at this stage, plaintiff's Complaint contains sufficient allegations of fact to withstand a demurrer.

For the reasons stated above, defendants' demurrer to plaintiff's claim under the VCPA damages is overruled.

Please prepare an order.

Thank you.

Sincerely,



Paul W. Cella

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE COUNTY OF NOTTOWAY

3
4 MATTHEW CHARLES HENDERSON,
5 Administrator of the Estate of
6 Charles L. Henderson

7 Plaintiff,

Case No.
CL19-00187-00

8 -vs-

9 HICKORY HILL RETIREMENT COMMUNITY,
10 LLC, d/b/a Hickory Hill Retirement
11 Community, and DOLORES V. MULLENS,
12 and COUNTRYSIDE ESTATES, LLC,

13 Defendants.

14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE: THE HONORABLE PAUL W. CELLA, JUDGE

16 September 23, 2019

17 1:00 p.m.

18 Nottoway, Virginia

19
20
21
22
23 HALASZ REPORTING & VIDEOCONFERENCE
24 1011 East Main Street, Suite 100
25 Richmond, Virginia 23219-3546
(804) 708-0025

Reported by: Terry L. Simmer, Court Reporter

1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE COUNTY OF NOTTOWAY

3
4 MATTHEW CHARLES HENDERSON,
5 Administrator of the Estate of
6 Charles L. Henderson

7 Plaintiff,

Case No.
CL19-00187-00

8 -vs-

9 HICKORY HILL RETIREMENT COMMUNITY,
10 LLC, d/b/a Hickory Hill Retirement
11 Community, and DOLORES V. MULLENS,
12 and COUNTRYSIDE ESTATES, LLC,

13 Defendants.

14 TRANSCRIPT OF PROCEEDINGS

15 BEFORE: THE HONORABLE PAUL W. CELLA, JUDGE

16 September 23, 2019

17 1:00 p.m.

18 Nottoway, Virginia

19
20
21
22
23 HALASZ REPORTING & VIDEOCONFERENCE
24 1011 East Main Street, Suite 100
25 Richmond, Virginia 23219-3546
(804) 708-0025

Reported by: Terry L. Simmer, Court Reporter

1 APPEARANCES:

2 THE LAW OFFICE OF JEFFREY J. DOWNEY, P.C.
3 By: JEFFREY J. DOWNEY, ESQ.
4 8270 Greensboro Drive, Suite 810
5 McLean, VA 22103
6 (703) 564-7318
7 Jdowney@jeffdowney.com
8 Counsel for Plaintiff

9 WOODS ROGERS, PLC
10 By: NANCY F. REYNOLDS, ESQ.
11 10 South Jefferson Street, Suite 1400
12 P. O. Box 14125
13 Roanoke, VA 24038-4125
14 (540) 983-7600
15 Nreynolds@woodsrogers.com
16 Counsel for Defendant

17 * * * * *

1 (1:18 p.m., September 23, 2019)

2

3

(Court reporter sworn)

4

5

6

7

8

THE COURT: Once again, I apologize. Since this is a district court courtroom, we don't have counsel table, so I'm sorry for the inconvenience on that, but we'll move forward.

9

10

11

12

And we have a number of defensive pleadings here. Ms. Reynolds, you may open. Go ahead, ma'am.

MS. REYNOLDS: Thank you, your Honor. I'm here on behalf of all the defendants.

13

14

15

First, I'd like to introduce Liliias Gordon. She's with Woods Rogers and she is observing today.

16

17

18

THE COURT: Nice to meet you.

MS. GORDON: Good for having me.

MS. REYNOLDS: Your Honor, I represent Hickory Hill, Delores Mullens, and Countryside Estates.

19

20

21

22

It's my understanding that plaintiff has agreed to dismiss Countryside Estates and we have an order to that effect, so that plea in bar is not necessary.

23

24

THE COURT: Mr. Downey, do you agree with that issue?

25

MR. DOWNEY: We have resolved that issue.

1 THE COURT: Very good. Countryside Estates is
2 dismissed. And if you want to pass that up, you may.

3 All right. I've entered that order. Thank
4 you, Counsel.

5 MS. REYNOLDS: Thank you, your Honor.

6 We're here, starting off, with a motion
7 craving oyer, your Honor. And because Countryside
8 Estates is now dismissed, half of that motion is out.
9 But the defendants have moved for oyer over the sales
10 brochure. That was specifically quoted in the
11 complaint. And the purpose of requesting that the sales
12 brochure be part of the complaint is so that it can be
13 used for the Virginia Consumers Protection Act claim.
14 So we know exactly what that is we are looking at --
15 (handing document to the Sheriff).

16 Your Honor, I am delighted to go through the
17 history of motions craving oyer back to ancient France
18 if the Court would like to hear that. However, I think
19 it's understood in Virginia jurisprudence that motions
20 craving oyer are appropriate when there is a document
21 referenced in the complaint that to the allegation in
22 the complaint, which as here, and it should be part of
23 the complaint for purposes of dispositive motions. And
24 it doesn't just apply to letters of probate and deeds as
25 has been stated in other circuits. Indeed, the Virginia

1 Supreme Court has approved over over promissory notes
2 back to the 1800s, or over a variety of other types of
3 documents, not just contracts.

4 But there was a case having to do with
5 Randolph Macon Women's College, and the court --

6 THE COURT: Uh-huh, you go ahead. I don't
7 mean to short-circuit your argument.

8 MS. REYNOLDS: If you know all of this stuff,
9 then I don't need to say it.

10 The Virginia Supreme Court has approved an
11 over over documents because -- not because it's -- well,
12 because it's relied on in the complaint. This is not a
13 discovery issue. It is a pleading issue.

14 THE COURT: That is, of course, the standard
15 argument the other way; that it's a discovery issue.
16 But you feel it's not since this is not the basis of the
17 claim.

18 MS. REYNOLDS: Yes, sir.

19 THE COURT: Okay.

20 THE COURT: Go ahead.

21 MS. REYNOLDS: I don't know if you want to
22 hear Mr. Downey.

23 THE COURT: Go ahead, Mr. Downey.

24 MR. DOWNEY: Judge, our only objection is that
25 we've already produced it. It's our position that the

1 court can determine from the pleadings whether we stated
2 the claim under the Consumer Protection Act. If your
3 Honor was to rule we hadn't stated a claim under the
4 Consumer Protection Act, and the leave to amend crave
5 oyer, and include in the complaint the --

6 THE COURT: Now, did I understand you to say
7 you already produced it to them, sir?

8 MR. DOWNEY: Yes, Judge. So it's our position
9 it's not necessary to incorporate into the pleadings.
10 First, because the court can evaluate the viability of
11 the consumer protection claim without that document and,
12 second, if I'm in a position where I need to file an
13 amendment, I don't really have a problem reproducing it.
14 But since it's already been produced, I frankly don't
15 understand the need to produce it as part of the
16 complaint.

17 THE COURT: Well, Ms. Reynolds, could you
18 respond to Mr. Downey's remark?

19 MS. REYNOLDS: Your Honor, that's a discovery
20 issue, that's not a pleading issue. Provided it to me
21 in discovery, but that doesn't make it part of the
22 complaint. And that's the point of oyer, is to make it
23 part of the complaint so it can be relied on when we're
24 looking at whether or not the Virginia Consumer
25 Protection Act claim should be dismissed.

1 THE COURT: Okay. I understand. And I'll
2 make one comment, because there are some interesting
3 issues here. I'm probably going to send you a letter
4 opinion. And I don't mean to disappoint you, but you're
5 not going to get a ruling from the bench today.

6 MR. DOWNEY: Thank you, Judge.
7 I appreciate that. That means it's well considered.

8 THE COURT: Well, you're very kind. Okay.
9 All right. Go ahead, Ms. Reynolds.

10 MS. REYNOLDS: Your Honor, we also have a
11 motion to strike allegations against Delores Mullens as
12 a member of an LLC. And let me be clear on the two
13 capacities in which Ms. Mullens has been pled into this
14 case as a member-owner of an LLC and as the
15 administrator of the facility and the issues related to
16 her as administrator of the facility.

17 THE COURT: That would have been items where
18 she was directly involved?

19 MS. REYNOLDS: Correct. And that would be
20 like she went on vacation and didn't leave someone in
21 charge who was well trained, or she -- I think these are
22 a punitive damages claim -- she knew or should have
23 known that leaving the facility without someone well
24 trained. That's not what we're talking about. All of
25 the other allegations don't have to do with her

1 individual negligence, that if she's left in as member
2 or owner of the LLC that that implies that she is also
3 accountable on a LLC -- or as respondeat superior basis
4 or something of that nature. That's not appropriate as
5 a matter of course by Virginia statute, Virginia Limited
6 Liability Company Act.

7 The point of having a limited liability
8 company is to protect the members from liability of the
9 corporate entity or the LLC. And so what we want to
10 make sure of is, where Ms. Mullens is concerned, indeed
11 she can be held accountable for her personal negligence
12 not at issue. But as far as all of the other stuff in
13 the complaint, it doesn't have to do with her individual
14 liability, then that's where the problem arises because
15 it wouldn't have to do with the administrator and
16 personally involved. It would have to do with her being
17 a member or owner of the LLC.

18 THE COURT: How do you think that would play
19 out at trial? Will there be some special verdict form
20 for that, for her? Or how do you think that would play
21 out?

22 MS. REYNOLDS: Well, if they find that she
23 is -- so she would be -- she would be looked at -- that
24 negligence would be looked at from the perspective of
25 whether or not she left the facility without someone who

1 was properly trained. And if they found that that was
2 not the case, it would require slicing and dicing it,
3 your Honor.

4 THE COURT: Okay. Well, we'll maybe cross
5 that bridge later, but I was just curious how you felt
6 about that.

7 MS. REYNOLDS: But from the respect of her
8 individually, she's registered as a licensed
9 administrator and it can be against her individually,
10 that does make a difference.

11 THE COURT: All right. Mr. Downey.

12 MR. DOWNEY: Yes, your Honor. The allegations
13 in the complaint include Ms. Mullens' independently
14 breached standards of care by failing to properly train
15 her staff, provide instructions and protocols, and that
16 Ms. Mullens also failed to properly assess and respond
17 to the dehydrated condition of Mr. Henderson upon her
18 return. So we're not dealing with just managerial
19 breaches, we're dealing with failures that are
20 understood to Ms. Mullens.

21 I cited the supreme court cases of Lockhart
22 vs. Commonwealth that says that where you have an
23 officer-agent who plays a role in the negligence, Judge,
24 then they're entirely appropriate to be included as a
25 defendant. And I understand what counsel is saying, but

1 I'm sure there is a jury verdict form that essentially
2 will separate out the two entities; one will be the
3 assisted living facility, and the other one would be
4 Mullens, Mullens as will be instructed by the court will
5 only be liable for actions of her own doing. So I don't
6 know how the court can parse out the separate
7 allegations. Now, that doesn't seem like something --

8 THE COURT: You think it would be premature.

9 MR. DOWNEY: I think it would be error and
10 premature because they are actual concurrent
11 tortfeasors. If their negligence complaint creates a
12 single harm, then they're both on the verdict form. So
13 I don't know how we could -- a demurrer generally goes
14 to the whole pleading. Although I understand this is a
15 motion to strike, I don't understand how the court could
16 selectively strike those allegations without
17 understanding what the experts say and how she's
18 essentially tied into it.

19 THE COURT: All right. Thank you.

20 Ms. Reynolds, you're entitled to rebut if you
21 care to.

22 MS. REYNOLDS: Thank you, your Honor. I guess
23 my point is that we're not -- when I'm stating that her
24 individual negligence is something that should be
25 struck, and we're not saying that she shouldn't be,

1 we're not saying strike her as a defendant. We're not
2 saying that. What we're saying is she shouldn't be held
3 accountable for negligence that should go to the
4 corporate entity. She's a member or an owner of the
5 business entity. And that's just a lot of negligence
6 that's being alleged in the complaint. That doesn't
7 have anything to do who you are individually. And it is
8 very harmful for her to have that on her record as an
9 individual.

10 And so I think it's a misstatement that we're
11 claiming that she's somehow exonerated or should no
12 longer be a defendant just because she has a corporate
13 capacity. That's not our argument, and I think the
14 court understands that that is not our argument.

15 I don't know how you divide it up without
16 having a separate count for her negligence, and that's
17 probably the appropriate way to do it --

18 THE COURT: All right.

19 MS. REYNOLDS: -- I would suggest.

20 THE COURT: Okay. Just a moment. All right.

21 MS. REYNOLDS: Okay. Your Honor, we have a
22 motion to strike inflammatory misrepresentations.

23 THE COURT: Yes, ma'am.

24 MS. REYNOLDS: And, your Honor, I've never
25 filed anything like this before. In 23 years I've never

1 filed before, but there are allegations in the complaint
2 that are demonstrably and verifiably inaccurate and just
3 plain incorrect.

4 In the Virginia Supreme Court cases where this
5 kind of thing occurs, there are sanctions awarded. And
6 I'm not asking for sanctions. I don't do that. But
7 where there are frivolous assertions or unfounded
8 factual and legal claims and assertions used to
9 intimidate and injure a party, the court has held that
10 that's just not appropriate.

11 And so in this case I think that it's very
12 clear that there are those kind of allegations. And
13 they can be found in paragraph -- I believe 48, where
14 Department of Social Services violations are alleged.
15 Okay?

16 Now, Mr. Henderson was at the facility from
17 July the 24th to August 10th of 2017. In paragraph 48
18 there are allegations about the Department of Social
19 Services citations against Hickory Hill, and those
20 allegations are for citations like failing to ensure the
21 staff received proper training. That would be a DSS
22 violation issued on January the 8th, 2019. Keeping in
23 mind that Mr. Henderson left the facility in August of
24 2017.

25 THE COURT: So you disagree with the statement

1 in paragraph 48 about it being prior to plaintiff's
2 residency.

3 MS. REYNOLDS: Correct. You can't have
4 knowledge of something that you're cited for, especially
5 when you're identifying the knowledge is coming from DSS
6 citations, you can't have knowledge of that in 2017 when
7 it didn't happen until 2019.

8 Failing to submit verification that a
9 qualified health professional is willing and able to
10 assume responsibility for assisting the development of
11 the facility's protocol. That was one of the citations
12 on May 31st of 2017. Now, that was before Mr. Henderson
13 came to the facility.

14 But let's drill down, because these are all a
15 matter of public record. You can verify when these were
16 issued and what they are about. And if you look on the
17 website and you drill down as to what that means, it
18 means failing to ensure that staff submitted an annual
19 evaluation documenting absence of tuberculosis. The DSS
20 noted that a qualified health professional, specifically
21 a doctor, nurse practitioner, or physician's assistant,
22 should be involved in establishing protocols, decisions
23 related to screening or testing for tuberculosis.
24 There's nothing about tuberculosis in this case, your
25 Honor. It's totally irrelevant to the issues in this

1 case. It was in here just to add another violation.

2 Failing to develop an individualized service
3 plan within 72 hours of admission, and failing to submit
4 evidence that the ISP service plan had been updated.
5 Now, there are issues in this case where individuals
6 lacked a service plan. The allegations are that these
7 were not submitted in a timely manner. But if you drill
8 down, you get to is the record was dated May 31st of
9 2017. That's before his admission. But it was -- if
10 you drill down and read that, when you read the
11 paragraph related to that, it's because -- the
12 individualized service plan was actually developed, it
13 just wasn't in the chart because it was out being signed
14 by the responsible party. So it's not a matter of it
15 not being developed, it's a matter of it not getting
16 back into the chart.

17 There is an August 30th and October 10, 2017,
18 DSS report based on the Henderson case --
19 Mr. Henderson's case. It was on this case. What that
20 is, is it's not advance notice. It happened after. The
21 DSS report happens after.

22 There is a January 8, 2019, item related to
23 the individualized service plan. That's not advance
24 notice.

25 And, see, I'm going through each one of these

1 and, your Honor, if you look at the timing of these or
2 the subject matter, failing to provide documentation
3 showing annual staff evaluations, there's nothing in
4 here about staff allegations. Nothing has been alleged.

5 Failing to label medication, over-the-counter
6 medication that they did not label. There's nothing in
7 this case alleged about failing to label medications.

8 Failing to correct a strong odor of urine,
9 May 29, 2015. Two years before. And this case has
10 nothing to do with the strong odors of urine.

11 And failing to secure a hazardous area, which
12 was a laundry room with cleaning supplies, in May 29,
13 2015. Two years prior. No allegation of that in this
14 complaint. And then there was one in January 2019 which
15 was post, long after he left.

16 So the allegations in paragraph 48 and from
17 the paragraph relying on the allegations in 48, which
18 would be paragraphs 47, 49, and 52, they are relying on
19 inflammatory information used to malign the character of
20 my client. Quite frankly, it has nothing to do with the
21 case, and they are not within the time frame required
22 for notice.

23 The claim in paragraph 49, a history of
24 noncompliance. Hickory Hill knew it was not suited for
25 residents with high acuity. So because of these various

1 instances of noncompliance, Hickory Hill was not suited
2 for residents with high acuity or potential behavioral
3 issues such as combativeness that Mr. Henderson
4 displayed. There's an assertion that just because there
5 are non-related violations, Hickory Hill globally cannot
6 provide care to residents like Mr. Henderson.

7 There's an assertion like -- an analogy if a
8 resident fell four times at a facility within the past
9 three months, then they don't have additional security.

10 We have negligence, duty, breach, proximate
11 cause, and damages. Plaintiff's argument is that if you
12 breached one duty, you breach all duties. This is not.
13 It's simply not. If you follow this, the client's
14 argument, then how do you assess proximate cause.

15 This case is a case where plaintiff is trying
16 to assert one of relevance not even within a relevant
17 time frame. Violations implies that all care at the
18 facility had not been provided, up to standards, and
19 that's just simply not the case. In Virginia negligence
20 is not looked at that way. It's looked at from a duty,
21 a specific duty and a breach of that duty. Not a global
22 breach of one duty, breach of all duties.

23 THE COURT: All right. Thank you.
24 Mr. Downey.

25 MR. DOWNEY: All right. I've never actually

1 dealt with a motion to strike inflammatory
2 misrepresentations. I would argue that these are not
3 inflammatory in the sense that I'm simply quoting
4 directly from their licensing surveys which are the
5 inspections that are done by the Department of Social
6 Services.

7 There was one inspection by the Department of
8 Social Services involving Mr. Henderson had sustained
9 various instances of neglect. And I would note in that
10 citation itself, which is Exhibit Number 2, it states
11 that failure to implement an individual service plan was
12 a repeat violation.

13 And I would submit that these allegations of
14 prior deficiencies are relevant to show, as I allege in
15 paragraph 47, that based on these deficiencies
16 defendants knew that the needs of their residents were
17 not being met.

18 Now, I'm not suggesting that every deficiency
19 is substantially similar to Mr. Henderson's
20 deficiencies, but certainly the failure of the care
21 plan, the service plan, failure to have adequate staff
22 training are substantially similar.

23 But the broader issue is they're on notice
24 from these serious Department of -- their licensing
25 investigation surveys, that they're not meeting the

1 needs of the residents. And these deficiencies taken
2 together, my position is, establish one more element of
3 punitive damages.

4 And I cited to your Honor the Crouse case,
5 which is a case where the nursing home had been cited
6 for prior neglect of a resident dealing with bed alarms.
7 It was actually a nursing home at a different chain, and
8 defense argued not relevant; plaintiff argued, look,
9 prior deficiency shows notice; and it went up to the
10 supreme court. And it's a very detailed opinion, but
11 essentially the court reasoned that prior deficiencies
12 can establish notice and can provide the basis for
13 punitive damages, which is why this dovetails into my
14 argument for punitive damages.

15 But these are standard deficiencies that are
16 public, that are already in the public domain. They're
17 not the inflammatory misrepresentations that we've seen
18 the supreme court strike certain cases. So I would
19 argue that this motion to strike should be denied.

20 THE COURT: Part of her argument, as I
21 understand it, is some of these items postdate your
22 client's situation. What is your position on that, sir?

23 MR. DOWNEY: Well, you know, with the
24 exception of the proper training, which I need to check
25 the date on that, the facility protocols was 5/31/17.

1 That's two months before the July 2017 citation. So I
2 think some of defense counsel's arguments premised on,
3 you know, when they actually got the surveys. But these
4 prior survey citations I got from surveys that all
5 predated my client's citations, if that answers your
6 question.

7 THE COURT: Yes, sir.

8 MR. DOWNEY: So I believe that they're all
9 prior to the allegations.

10 THE COURT: All right. Thank you, sir.
11 Ms. Reynolds.

12 MS. REYNOLDS: Your Honor, I would strongly
13 recommend, when you're going back over this, is to look
14 at the attachments to my brief because I have provided
15 you with every one of the DSS -- even the good ones,
16 what I found, I provided you with every one of them so
17 you can look and see which ones relate and which ones do
18 not.

19 But I will say the one having to do with
20 protocol, that had to do with tuberculosis, whether or
21 not there would be doctors, nurse practitioners, and
22 such who could participate in developing protocol
23 related to tuberculosis screening. So that's just
24 not -- that has nothing to do with this case. So some
25 being that a lot of these are not within the relevant

1 time period, and a lot postdate Mr. Henderson's
2 residency, and a lot of them have absolutely nothing to
3 do with this case.

4 This case is about dehydration, failure to
5 ambulate I think is one of the things, and lack of staff
6 training. And if you can find --

7 THE COURT: Well, is this a situation where it
8 might be more a case of a motion in limine later, or a
9 motion at trial as to whether certain items do or do not
10 come in as opposed to me throwing it all out at the
11 pleading stage?

12 MS. REYNOLDS: Well, your Honor, it would be
13 very beneficial to throw it all out at the pleading
14 state so we don't spend a lot of time on it in the
15 discovery process, quite frankly. It's very helpful.
16 And if it doesn't have -- I will be defending everything
17 the facility does essentially because that's the way it
18 has been pled in their complaint. I'll be defending
19 everything that the facility does because it's all under
20 one umbrella as care provided by the facility when it
21 may not be anything that has anything to do with the
22 actual malpractice or actual negligence alleged in this
23 case.

24 THE COURT: All right. Thank you,
25 Ms. Reynolds.

1 MS. REYNOLDS: Thank you.

2 THE COURT: Go ahead with your next motion,
3 then.

4 MS. REYNOLDS: Punitive damages. Your Honor,
5 we have demurred to the punitive damages claim.
6 Standards to survive demurrer in a punitive damages
7 claim are willful and wanton. You have to plead willful
8 and wanton negligence, which is a conscious disregard
9 for the rights of others, or reckless indifference to
10 consequences with knowledge that injury is probable.
11 And the Virginia Supreme Court has stated that
12 misconduct, or actual malice, or recklessness, or
13 negligence to events, and conscious disregard for the
14 rights of others is required, in Condo Services, Inc.
15 vs. First Owners' Association of 4600 Condo, Inc.,
16 281 Va. 561.

17 The Virginia Supreme Court has stated, and
18 then the court knows this, ordinary negligence is not
19 enough. It has to be -- it has to convey purpose or
20 design.

21 And as is important to this case, in Doe v.
22 Isaacs, 265 Va. 531, the Virginia Supreme Court held
23 that mere violation of a law or regulation without more
24 would not constitute willful or wanton negligence
25 necessary for a punitive damages claim.

1 So in the complaint, paragraphs 44 and 45, the
2 allegations are failure to timely inform the responsible
3 party and doctor of problems with care and changes in
4 condition. Failure to inform the responsible party and
5 the doctor of problems with care that he was combative
6 or changes in condition. That's an ordinary negligence
7 claim, your Honor. That's plain and simple ordinary
8 negligence, the medical conditions dehydration and
9 combateness.

10 Paragraph 46, failure to provide sufficient
11 staffing and staff training to handle combative
12 residents. That's an ordinary negligence claim. They
13 had to do this, they failed to do it.

14 Paragraphs 47 and 48, on notice from
15 Department of Social Services' investigations that
16 Hickory Hill was not suited for high-acuity residents.
17 Independent of the timing issues of these DSS
18 notifications and whether or not what's contained in
19 there is at all relevant to the case, mere violation of
20 regulation is not sufficient for a punitive damages
21 claim. Doe v. Isaacs case. That's what the Virginia
22 Supreme Court has stated. So the claims that are made
23 in and of themselves are ordinary negligence claims, and
24 the ones that have to do with knowledge of DSS
25 violations, even if they're relevant, that is not

1 sufficient.

2 But plaintiff goes further and says that on a
3 punitive damages claim that there is LLC responsibility
4 to support a punitive damages claim. And in order to
5 have that, the complaint has to set forth facts that the
6 employer, or the LLC, authorized and instructed the
7 employee to recklessly proceed forward with full
8 knowledge of the dangers and probable consequences.
9 Employer is not accountable for punitive damages simply
10 because its employee engaged in willful and wanton
11 conduct. The employer has to have either ratified or
12 authorized it, or have someone in a sufficiently high
13 position to have done so. Okay?

14 So what are the complaint allegations on
15 ratification? Paragraph 52. Failure to correct prior
16 violations that are substantially similar. First,
17 whether or not there are prior violations and relevance
18 we've dealt with. Whether or not they're substantially
19 similar, substantial similarity consists of conditions
20 of a prior event that were under substantially the same
21 circumstances and had been caused by the same or similar
22 defects and dangers as those at issue. So first, we're
23 talking about like a malpractice kind of case. And I
24 think sometimes when you're talking about medical
25 issues, it's hard to get anything that's substantially

1 similar or the same with similar effects or dangers.

2 But the issues that have been cited or the
3 violations that have been cited as substantially similar
4 are, not involving a doctor or nurse practitioner in
5 establishing protocols related to tuberculosis
6 screening, an instance of not having individual service
7 plans or an update returned to a chart after being
8 signed, not documenting staff evaluations, medication
9 labeling, odor of urine, and securing the laundry room.
10 They're not substantially similar to the issues involved
11 in this case; dehydration, ambulation, and staff
12 training, inadequate staff training. Again, ordinary
13 negligence. And I don't know how you have full
14 knowledge of the probable consequences related to staff
15 training. That could be anything.

16 The administrator's awareness of regulatory
17 violations and inadequate staffing. The administrator's
18 awareness of those items is not sufficient based on
19 Virginia Supreme Court precedent. Regulatory violations
20 are not sufficient to establish punitive damages.

21 And with regard to the administrator,
22 Ms. Mullens had to have been a participant in the
23 willful and wanton conduct. She has to have engaged in
24 conscious disregard for the rights of others. There's
25 nothing that says she -- what she engaged in was leaving

1 the facility for vacation, and the claim is that there
2 was not trained people there. And failing to properly
3 train the staff, failing to respond to his dehydration
4 condition upon her return.

5 Again, these are ordinary negligence claims.
6 This is standard negligence. This is not willful and
7 wanton -- it doesn't rise to willful and wanton conduct.
8 And so from the perspective of the punitive damages
9 claim, your Honor, we would request that it be
10 dismissed.

11 THE COURT: All right. Thank you.
12 Mr. Downey.

13 MR. DOWNEY: Your Honor, as you know, under
14 the reckless disregard standard you'd only prove that
15 defendants knew or should have known that their actions
16 could cause harm. Since a demurrer goes to the whole
17 pleading, it should be overruled if any part of the
18 pleading supports a punitive damages claim. In short,
19 if any of the allegations meet the punitive damage
20 threshold, the entire count should be sustained. If
21 reasonable minds could differ on whether any of the
22 alleged conduct rose to the level of disregard, giving
23 the plaintiff the benefit of all inferences, the jury
24 question is presented.

25 As a practical matter, Judge, we've gone far

1 beyond reckless allegations. We've alleged -- and keep
2 in mind, your Honor, there are plenty of allegations in
3 this case that get incorporated into the punitive damage
4 count by reference, so the fact that it's not in that
5 last count doesn't prevent the court from considering
6 well-pled allegations. We pled that the staff abused
7 Mr. Henderson by physically holding him down to provide
8 care. That's an allegation completely ignored by the
9 defendant.

10 I cited the seminal Booth vs. Robertson case
11 where a professional truck driver failed to put safety
12 flares behind the truck. Defense argument, well, no,
13 simple negligence. And there the supreme court said,
14 well, no, you have a professional driver who should have
15 known that in that situation he's putting people at
16 risk.

17 That's the exact same situation by analogy
18 here. Defendant staff should have known that not
19 providing hydration and medications to an elderly
20 patient, especially one -- and here we've pled that they
21 knew that he had tendencies to become dehydrated. In
22 other words, they had prior knowledge of this problem.
23 So their failure to provide him with hydration to the
24 point that when he goes to the hospital he's literally
25 terminal because he's suffered so much kidney damage

1 from the dehydration that he cannot even be treated. He
2 goes directly to hospice. Again, giving the benefit of
3 all inferences -- and their own records show that he
4 went without fluids for at least a day -- giving the
5 benefit of all inferences, could a reasonable mind
6 conclude that not providing an elderly person fluids for
7 an entire day would cause them harm. And I would submit
8 you don't even need to be trained to understand.

9 But keep in mind, your Honor, that the facts
10 in this case are more egregious because the staff had
11 knowledge of his prior tendencies to become dehydrated.

12 Now, we have alleged that the defendants had
13 an improperly-trained staff, a staff that frankly wasn't
14 able to deal with a high-acuity patient, as evidenced by
15 the conduct of the staff in holding him down as opposed
16 to calling the doctor to get care. It's an important
17 distinction because where you're accepting a high-acuity
18 patient into a facility and you don't have the ability
19 to meet his needs, which must be assumed it's true
20 because it's well pled, and then that facility has a
21 very bad licensing record, you've met the standard for
22 threshold.

23 I cited the Cabiness vs. Medical Facilities of
24 America case, your Honor. That's a case where a nursing
25 home lacked proper training to provide care for a

1 feeding tube resident, and in that situation the court
2 found that the fact that the staff didn't have adequate
3 training was another basis supporting punitive damages.
4 Why? Because when you put a patient who needs these
5 specialized needs in a situation where the staff is
6 unable to care for them, you're increasing the
7 probability that he's going to be harmed. And I know
8 the defense will argue, well, that had to do with
9 something other than dehydration, but here our position
10 will be, and we believe borne out by discovery, that the
11 staff wasn't properly trained in how to deal with
12 dehydrated residents.

13 We also cited the Crouse vs. Medical
14 Facilities of America case. Your Honor, that went all
15 the way up to the supreme court. In that case the
16 supreme court -- well, the trial court -- found that
17 punitive damages was supported in part by the facility's
18 knowledge of prior problems in the use of safety alarms.
19 And the supreme court found there was no error in
20 supporting punitive damages under prior statements of
21 deficiencies -- and that was a facility that was in the
22 same chain, but it was not the same facility, it was a
23 facility within the chain -- and the court imputed
24 knowledge to them. This is the same facility, a
25 facility that had previously been cited for failures in

1 staff training, failures to have service plans in place,
2 and I would argue that's sufficient to get us to the
3 notice stage where they should have known that they're
4 going to cause harm to the residents.

5 So when you combine these allegations, Judge,
6 intentional neglect, reckless disregard, with facts of
7 an inadequately-trained staff, prior history of civil
8 and regulatory violations, there's more than sufficient
9 facts to support a punitive damage claim in this case.

10 As to ratification, your Honor, I pled
11 in detail the bases for ratification, paragraph 52, that
12 they ratified their conduct by condoning it, by failing
13 to repeat prior incidences, by intentionally staffing
14 the facility without sufficient numbers to meet the
15 needs of the residents, the management staff was aware
16 of those violations and participated in them. Clearly
17 at the pleading stage, Judge, there's enough to be pled
18 to establish ratification, and I ask that I be allowed
19 to engage in the proper discovery because I believe that
20 the discovery will support the allegations of punitive
21 damages that are just beginning to be fleshed out in the
22 complaint.

23 THE COURT: All right. Thank you.
24 Ms. Reynolds.

25 MS. REYNOLDS: Yes, sir. I would restate that

1 it would be really, I think especially after that
2 argument, advisable to go back and look at what the DSS
3 citations are for because they don't establish prior
4 knowledge of what is being alleged in the complaint, and
5 that the knew or should have known element just simply
6 does not exist.

7 THE COURT: All right. Thank you.

8 MS. REYNOLDS: Yes, sir.

9 THE COURT: Now, we next have I believe your
10 Consumer Protection Act motion.

11 MS. REYNOLDS: Yes, sir. I'm sure the Court
12 is very familiar with the Virginia Consumer Protection
13 Act. It was originally passed to prohibit false
14 advertising. And so it's being used now in malpractice
15 cases because of the treble damages aspect as a way of
16 driving at damages. Okay? And so I have argued this
17 many, many times, and one of the pleasures I have not
18 had in prior cases is actually statutes that say that my
19 client can do certain things.

20 And so under the Virginia Consumer Protection
21 Act, claimant on Count II is claiming that there were
22 misrepresentations that the services provided had
23 certain characteristics, and claims in paragraph 30 that
24 they were statements from the admissions folks saying
25 that the staff could meet Mr. Henderson's needs for

1 hydration.

2 In paragraphs 17 and 31, plaintiff relies on a
3 sales brochure which says that Hickory Hill promised
4 special amenities, recreational and personal care, as
5 well as specialized care for dementia and Alzheimer's in
6 our memory care unit, and described their services to
7 include RNs, LPNs, and a full complement of personal
8 care services including medication management and health
9 oversight 24 hours.

10 And then in 32, paragraph 32, the website
11 explains that our specialized team of trained nurses
12 provides joy and happiness while providing
13 professionalism and personal care, health care,
14 activities and stimulation in an environment of
15 beautiful surroundings. And so those are the
16 allegations related to the Virginia Consumer Protection
17 Act claim.

18 In Virginia Code 59.1-199(A), part of the
19 Virginia Consumer Protection Act, it has an exclusion
20 which applies in this case. And the exclusion says the
21 Act shall not apply to any aspect of a consumer
22 transaction which aspect is authorized under laws and
23 regulations of this commonwealth or the United States
24 for the formal advisory opinions of any regulatory body
25 or official of this commonwealth or United States.

1 Okay?

2 And so authorized actions. Authorized actions
3 under Manassas Autocars, Inc. v. Couch, 274 Va. 82, are
4 those that are sanctioned by the statute or regulation.

5 Virginia Code section 63.2-1800(B) authorizes
6 assisted living facilities -- which is what Hickory Hill
7 is, they are regulated by the Department of Social
8 Services not Health Professions -- authorizes assisted
9 living facilities to advertise by describing services
10 available at the facility. Right out of the statute.
11 That is exactly what is contained in the sales brochure
12 and the website; this is what we provide, we provide
13 specialized care for demential and Alzheimer's in our
14 memory care unit, RNs and LPNs, a full complement of
15 personal care services.

16 THE COURT: Well, if the plaintiff were to
17 say, well, they can advertise, but that doesn't give
18 them the right to falsely advertise, what would be your
19 response to that?

20 MS. REYNOLDS: Actually I was going to get to
21 that.

22 THE COURT: All right. Well, if you're going
23 to come to that, then just come to it in due course.

24 MS. REYNOLDS: Okay. So Virginia Code section
25 63.2-1802, and Virginia Administrative Code

1 2240-72-1060, authorizes Hickory Hill as an assisted
2 living facility to provide safe, secure environments for
3 residents with serious cognitive impairments due to
4 primary psychiatric diagnosis of dementia.

5 The administrative code under Department of
6 Social Services addresses staff training and
7 specifically the number of hours for training annually,
8 22 VAC 40-72-260.

9 The Department of Social Services Regulations,
10 22 VAC 40-72-1010, covers staff training on cognitive
11 impairments; requiring administrators to have 12 hours
12 training on cognitive impairment in the first three
13 months, and direct care staff four hours in the first
14 four months of employment. And then it goes on, on
15 staff training on dementia. 22 40-72-1120, requires the
16 facility provide four hours of training on dementia
17 within the first four months of employment, and an
18 additional six hours in the first year.

19 22 VAC 40-72-45 I, the facility shall provide
20 personal assistance and care with ADLs including eating
21 and feeding.

22 And then 40-72-260 C, services shall be
23 provided to prevent clinically avoidable complications
24 including dehydration.

25 Now, all of this is regulated. Everything

1 that has been cited in here is regulated by the
2 Department of Social Services.

3 Now, the question is, well, they can do this,
4 but there's nothing that says that they're authorized to
5 not do this? Or to provide inadequate care? You're
6 never going to find a regulation that says that. What
7 you are going to find, and the reason for this exemption
8 from the Virginia Consumer Protection Act, is that there
9 is a regulatory agency.

10 And I can tell you that one of the most
11 highly-regulated businesses in this country is a
12 long-term care. Assisted living facilities have so many
13 obligations to the Department of Social Services. It is
14 up to the Department of Social Services. And it is up
15 to a claim for violation of those regulations that --
16 that is the focus on not providing these levels of care.
17 It's not under the Virginia Consumer Protection Act. It
18 is to the Department of Social Services and its
19 regulatory authority to deal with violations of what
20 they're required to do under their regulations.

21 Whether or not they advertise for services
22 they provide, they're allowed to do that; advertising
23 for services that they claim they have. And it's
24 something that they're supposed to have under the
25 Department of Social Services regulations, then you go

1 to the Department of Social Services regulations because
2 that's the agency that has been given the authority to
3 deal with these kinds of violations as we can see
4 because they have been cited for various violations.

5 And I want to add also that the Virginia
6 Consumer Protection Act, despite what plaintiff says,
7 Virginia Consumer Protection Act claims are fraud
8 claims, are basically fraud claims.

9 The Virginia Supreme Court has held under
10 Owens v. DRS Automotive Fantomworks, 288 Va. 489, a 2014
11 case, you must allege fraud. You must allege a Virginia
12 Consumer Protection Act claim with the specificity that
13 you allege a fraud case. False representation of a
14 material fact made intentionally and knowingly. When
15 you have a willful claim, you have to have the
16 intentional and knowing in this -- their claim. So
17 violation so you can get treble damages, so you have to
18 also allege intentionally and knowingly with intent to
19 mislead, reliance, and resulting damages.

20 THE COURT: And I take it there are no
21 Virginia Supreme Court cases on point on this issue, am
22 I correct on that? I mean directly on point dealing
23 with nursing homes or - - - -

24 MS. REYNOLDS: Correct, there are no nursing
25 home cases.

1 THE COURT: Okay. Go ahead.

2 MS. REYNOLDS: The statement and admission
3 that the defendant's staff stated they could meet
4 Mr. Henderson's needs for hydration, from a fraud
5 perspective that is a statement of a future event. It
6 is not a statement of an existing fact. That doesn't
7 qualify for a fraud claim.

8 Promotional materials. The sales brochure
9 that they had special amenities, and the website that
10 they can, you know, provide this happy environment, joy
11 and happiness, this is sales puffery. This is not a
12 fraud claim. And, again, the statute allows them to say
13 these things.

14 So, your Honor, under the Virginia Consumer
15 Protection Act I don't believe that there's a claim. I
16 think that what's been asserted here is excluded under
17 the Act. Thank you.

18 THE COURT: All right. Thank you,
19 Ms. Reynolds. Mr. Downey.

20 MR. DOWNEY: Your Honor, briefly. As you
21 know, your Honor, the supreme court has repeatedly
22 cautioned trial courts about dismissing matters on
23 demurrer because of the fact that these are preliminary
24 motions.

25 THE COURT: Indeed so.

1 MR. DOWNEY: The defendant has apparently
2 argued this motion many times, but what I have not heard
3 was any cases that actually supported the defense
4 position. Defendant hasn't cited a single case in
5 Virginia holding that one cannot sue an assisted living
6 facility under the circumstances in this situation.

7 Now, the defendants don't dispute that we've
8 pled all the essential elements of a claim, that it was
9 a material allegation that it cautioned harm, that there
10 was reasonable reliance. They argued first that we
11 relied on fluff or opinions, and I would respectfully
12 disagree.

13 The allegations that they have medication
14 oversight 24 hours a day, that the staff is specially
15 trained to provide specialized care for dementia
16 patients. Paragraph 34 alleges misrepresentations that
17 they have the ability to provide frequent monitoring and
18 hydration, current situation for Mr. Henderson, on
19 factual allegations, Judge.

20 The U.S. District Court addressed this in the
21 Beaty vs. Manor Care case, found that a consumer
22 protection claim was properly asserted against an
23 assisted living facility for misrepresentations
24 involving very similar facts, Judge. Those involved a
25 highly-trained staff, 24-hour supervision. While the

1 court noted that assisted living facilities were highly
2 regulated, that court also noted that they were not
3 preempted.

4 Similarly in McCauley vs. Purdue Pharma, the
5 court found that medical providers could be covered
6 under the Consumer Protection Act despite the
7 highly-regulated pharmaceutical industry, which I would
8 submit is a lot more regulated than assisted living
9 facilities, and they noted that there was no preemption
10 for regulations because the regulations did not
11 authorize, and this is important, the regulation must
12 actually authorize the type of conduct at issue.

13 I cited the Humphrey v. Leewood case, a case
14 that I was involved in, where the Fairfax Court found
15 that a nursing home could be covered by the Consumer
16 Protection Act where it was providing personal services.
17 Again, despite the heavily-regulated nursing home
18 industry, the court refused to apply preemption
19 principles. And when discussing the preemption, the
20 Humphrey court said that the failure of the agency to
21 forbid a particular practice does not mean the agency
22 has authorized it. And I think that's an important
23 distinction in the case.

24 Interesting that the defendant cites the
25 Manassas Autocars case in their reply brief. That was a

1 case where the supreme court noted that for an exemption
2 to apply to a consumer protection claim, the particular
3 practice must be authorized by statute, not the
4 industry's entire scope of an activity.

5 Defendant then reasons that since a licensing
6 statute, in this case Virginia Code 62.3-1800(B), states
7 that nothing in this section shall prevent a facility
8 from describing services available, that somehow
9 constitutes an authorization. Permission to approach,
10 your Honor?

11 THE COURT: Yes.

12 MR. DOWNEY: I just wanted to show your Honor
13 the statute that the defendant now exclusively relies
14 upon to argue preemption. It is a licensing statute.
15 They rely on section B, and it simply says that assisted
16 living facilities should not use several names in their
17 title that might be misleading, like hospital. And then
18 it goes on to state no facility shall advertise or
19 market a level of care that it's not licensed to
20 provide. Nothing in this subsection shall prohibit the
21 facility from describing the services available in the
22 facility. That just says what we already knew, which
23 was a facility can describe the services. It doesn't
24 authorize them to misrepresent the nature of the
25 services.

1 In the Manassas Auto case, they had a
2 regulation that allowed advertising by stock number, and
3 there was a dispute about whether that regulation was
4 superseded by a statute or not. But what was clear from
5 that case is if there was a practice where they were
6 advertising the sale of cars by stock number, since that
7 practice had been specifically authorized it would be
8 preempted. We're not dealing with a situation where
9 this licensing statute authorizes them to provide
10 inaccurate information about the services.

11 And this is an important area, your Honor,
12 from a policy standpoint. More and more assisted living
13 facilities are recruiting nursing home patients,
14 essentially patients that have high acuity, that have
15 dementia. And we've seen a shift of assisted living
16 facilities, I would argue, biting off more than they can
17 chew. In a lot of situations, these patients may not
18 have medical malpractice claims, but they should have
19 the ability to come into court and pursue a consumer
20 protection claim when they're promised services in an
21 assisted living facility that aren't simply delivered.

22 That is the purpose of this statute, and it's
23 a remedial statute that is to be interpreted broadly.
24 And I would argue that an interpretation that created
25 preemption based on the licensing statute would be

1 inconsistent with the principles of statutory
2 constructions that are taught to us by the Virginia
3 Supreme Court, your Honor. And that's all I have on
4 that point, and I think that concludes my argument on
5 that.

6 THE COURT: All right. Thank you, Mr. Downey.
7 Ms. Reynolds.

8 MS. REYNOLDS: Thank you, your Honor. I think
9 Mr. Downey reads this too broadly. Your Honor,
10 Mr. Downey says that the regulations must authorize the
11 conduct. I have cited regulations that authorize the
12 facility to do the variety of things that are being
13 claimed here to be violations of the Consumer Protection
14 Act. And we kind of need to look at what is claimed to
15 be violations of the Consumer Protection Act, and that
16 is that they would meet Mr. Henderson's hydration needs.
17 Well, that's one of the things that he's claiming is a
18 violation of the Consumer Protection Act. And that is
19 specifically regulated, meaning the hydration needs of
20 residents. And so that should be included under the
21 exclusion.

22 One of the things that was cited to was the
23 Beaty case. The Beaty case is a U.S. District Court
24 case that's unpublished which has very limited
25 precedential value. But the important thing about that

1 case is that it is a medical malpractice case. It's for
2 a skilled care facility. Wait a minute. I'm sorry. It
3 is an assisted living facility, and the court noted that
4 the exclusion, that we're dealing with here, does not
5 exempt entire industries, but exempts certain
6 transactions that are already covered by Virginia or
7 federal law which identify the transaction based on the
8 regulations that are identified by Virginia law.

9 The Beaty court focussed on whether the
10 defendants advertised services it was not licensed to
11 provide, that it was not licensed. Like we are a
12 skilled care facility which is not licensed, correct.
13 We provide services for ventilator residents; it's not
14 licensed to provide those. Those are the kinds of
15 things that if they were -- it's listed what they can
16 provide and what they can't provide. And if they
17 advertise that they provided one of the things they're
18 not licensed to provide, then that would be in violation
19 of that part of the statute.

20 The violation in Beaty was advertising
21 services it didn't provide. And the plaintiff claims
22 the services were provided -- in this case plaintiff
23 claims that the services were provided, just not up to
24 standards. That is a negligence claim. This is not a
25 Virginia Consumer Protection Act claim, this is a

1 negligence claim. The hydration was provided, just not
2 sufficient hydration.

3 In their sales brochure, they provided
4 dementia and Alzheimer's care, which assisted living
5 facilities are allowed to provide. It's not outside
6 their licensing. They just didn't provide it
7 adequately.

8 It includes providing RNs and LPNs. It was
9 never alleged that they don't provide RNs or LPNs.
10 Maybe they didn't try to provide them well trained
11 enough. That's a negligence claim.

12 Providing joy and happiness, that's just --
13 that's puffery.

14 MR. DOWNEY: We're not relying on the joy and
15 happiness theory.

16 THE COURT: Okay.

17 MS. REYNOLDS: Well, that's in the complaint.

18 THE COURT: Okay.

19 MS. REYNOLDS: So, your Honor, for the
20 Virginia Consumer Protection Act claim, it is -- these
21 assertions, and plaintiff tries to scoop into this
22 count, Count II, everything in the complaint. Well,
23 everything in the complaint is in the Virginia Consumer
24 Protection Act claim. It's very specific, and has to be
25 alleged because it is a fraud claim, is a very specific

1 claim and they specifically asserted things under that
2 count and those things are exempt or excluded under that
3 provision of the code, or don't quantify as fraud, your
4 Honor. Thank you.

5 THE COURT: All right. Thank you,
6 Ms. Reynolds.

7 All right. Well, thank you, Counsel, for an
8 interesting argument, and I'll --

9 MR. DOWNEY: Thank you, Judge.

10 THE COURT: I'll be in touch with you shortly.
11 Thank you again. And, again, I'm sorry for the
12 inconvenience in having to switch courtrooms.

13 (Proceedings concluded, 2:18 p.m.)

14

15

* * * * *

16

17

18

19

20

21

22

23

24

25

1011 East Main Street, Suite 100 Richmond, VA 23219-3546
CERTIFICATE OF COURT REPORTER

I, Terry L. Simmer, shorthand reporter, Notary
Public in and for the Commonwealth of Virginia at Large,
and whose commission expires November 30, 2022, do
hereby certify that I reported verbatim the proceedings
in the Circuit Court for the County of Nottoway, in
Nottoway, in the captioned cause, heard by the Honorable
Paul W. Cella, Judge of said court, on September 23,
2019.

I further certify that the foregoing
transcript, numbering pages 1 through 45, inclusive,
constitutes a true, accurate, and complete transcript of
said proceedings.

Given under my hand this 21st day of October,
2019.

NOTTOWAY CIRCUIT CT.

A Copy, Teste: Jane L. Brown, Clerk

By Jane L. Brown J.C.



TERRY L. SIMMER, Court Reporter

Notary Public, Reg. No. 149483

Commonwealth of Virginia at Large