TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

JEFFREY W. PARKER, JUDGE
40 CULPEPER STREET
WARRENTON, VIRGINIA 22186

STEPHEN E. SINCAVAGE, JUDGE
POST OFFICE BOX 470
LEESBURG, VIRGINIA 20178

Loudoun, Fauquier and
Rappahannock Counties

JEANETTE A. IRBY, JUDGE
POST OFFICE BOX 470
LEESBURG, VIRGINIA 20178

DOUGLAS L. FLEMING, JR., JUDGE
POST OFFICE BOX 470
LEESBURG, VIRGINIA 20178

W. SHORE ROBERTSON, JUDGE RETIRED
JAMES H. CHAMBLIN, JUDGE RETIRED
THOMAS D. HORNE, JUDGE RETIRED
BURKE F. MCCAHILL, JUDGE RETIRED

April 3, 2018

Jeffrey J. Downey, Esquire
The Law Office of Jeffrey J. Downey, P.C.
8270 Greensboro Drive, Suite 810
McLean. Virginia 22102

Juliane C. Miller, Esquire
Hudgins Law Firm, P.C.
515 King Street, Suite 400
Alexandria, Virginia 22314

Re: Miriam Hirsch, et. al. v. CSP Nova, LLC, et. al.
Civil Case No. 108222

**LETTER OPINION AND ORDER**

Dear Counsel,

This case came before the Court on April 3, 2018 for argument on the Plaintiff's Motion to Compel ("Motion"). The Court heard argument and took the Motion under advisement. This Letter Opinion and Order ("Letter Opinion") follows.

**Background**

This is a negligence case brought by the Executor of Miriam Hirsch's Estate ("Plaintiff")[1] in which Miriam Hirsch ("Miriam") suffered a hip fracture when she fell on March 1, 2016, while

[1] Although this case was originally brought by Vicki Beth Hirsch, Miriam's daughter, as Miriam's "next friend," by order entered January 23, 2018, this Court permitted the substitution of the Estate for the individual as Plaintiff following Miriam's death during the pendency of this case.

she was a patient at Potomac Falls Health and Rehab Center ("Potomac Falls"), a licensed long-term care and rehabilitation skilled nursing facility owned and/or operated by CCSP Nova LLC ("CCSP") and Commonwealth Care of Roanoke, Inc. ("CCR") (collectively, "Defendants").[2,3] Plaintiff has filed an Amended Complaint asserting the following claims against Defendants:

- Count I: Negligence/Survivorship
- Count II: Punitive Damages

Plaintiff alleges in the Amended Complaint that Miriam was admitted to Potomac Falls on February 18, 2016, with dementia, confusion, unstable gait, and a history of falling from bed. Plaintiff further alleges that Miriam was known to the facility from her prior admissions and the staff of Potomac Falls knew she was a high fall risk requiring active supervision and extensive assistance with her daily living activities, including toileting. She had, in fact, fallen during a prior admission. Plaintiff alleges that Defendants and their employees owed Miriam a duty to provide reasonable care and to properly monitor, assess, treat, maintain, and rehabilitate her. Plaintiff also alleges that, as operators of a skilled nursing facility, Defendants had a duty to provide sufficient staffing, including nurses, nurse aides, and other staff, in sufficient numbers and with sufficient training to meet Miriam's needs. Plaintiff alleges that Defendants violated the applicable standards of care by providing staffing that was insufficient in numbers and training to meet Miriam's basic daily living needs and to keep her safe. Specifically, Plaintiff alleges that, prior to the fall, Miriam experienced multiple failings by Defendants' staff to respond to her calls for help and that, on the evening in question, the staff had failed to respond to Miriam's call bells for toileting, which ultimately resulted in Miriam attempting to toilet herself when she fell and broke her hip in the early morning of March 1, 2016. Plaintiff also alleges that Defendants and their agents/employees subjected Miriam to substandard care in violation of accepted standards by negligently failing to (a) undertake adequate fall assessments

---

[2] A former co-defendant, Inova Health Systems Services, was recently nonsuited from this case.

[3] In this discovery dispute, Plaintiff admittedly focuses on the discovery requests issued to CCSP, "the licensed operational entity," but asks the Court to also apply its rulings to CCR, "the management company" on whom Plaintiff served the identical discovery requests. Defendants respond that, given that CCSP and CCR are "distinct entities" with "custody and control of different information and documents" and "independent obligations to respond to the discovery requests," Plaintiff's request to have the Court's rulings applied jointly to both Defendants should be rejected. Defendants fail, however, to specify which Defendant has custody and control of what information and documents or to otherwise distinguish between or describe the "independent obligations" of the individual Defendants. Conversely, Plaintiff alleges that Defendants jointly participated in the "operation, control, and/or management" of the Potomac Falls facility. Thus, unless and until Defendants specifically draw a meaningful distinction between Defendants and their discovery obligations, the Court may properly treat Defendants as mutually responsible for responding to Plaintiff's discovery requests and apply all discovery rulings to them jointly.

of Miriam's condition and/or document the results of such assessments in her record; (b) provide adequate care planning, including care planning for fall prevention; (c) provide adequate assistance with basic daily living activities, including hygiene and related care; (d) timely respond to Miriam's request of assistance through her call lights, forcing her to void urine or feces upon herself; (e) provide adequate supervision of the staff, who would watch TV and use their phone while patient call lights went unanswered; and (f) provide Miriam with adequate assistance in consuming food and water, causing her to lose weight. Thus, Plaintiff alleges, Defendants breached their duty of care by failing to provide sufficient staffing to meet Miriam's basic daily living needs and prevent her fall. Plaintiff further alleges that, as a direct and proximate cause of Defendant's negligence and breaches in applicable standards of care, Miriam sustained personal injuries including a hip fracture, as well as pain and suffering, medical expenses to treat her injuries, humiliation, embarrassment, inconvenience, and a corresponding decline in her physical and mental condition. Plaintiff also alleges that Defendant's willful, wanton, and reckless conduct via their management staff, as well as their ratification of such conduct undertaken by their employees, warrant an award of punitive damages against Defendants. Plaintiff seeks to recover $1,250,000 in compensatory damages and $700,000 in punitive damages.[4]

With regards to the parties' instant discovery dispute, Plaintiff served its initial discovery requests, consisting of Plaintiff's First Interrogatories and Document Requests, on Defendants on May 8, 2017, seeking information on a variety of subjects, including staffing levels, staff training, facility protocols, and prior instances of similar problems. On August 7, 2017, CCSP (and, according to Defendants, CCR) provided objections and responses to Plaintiff's interrogatories and document requests. On August 9, 2017, Plaintiff sent Defendants a letter outlining various discovery deficiencies in "Defendants' discovery responses in this matter." On August 29, 2017, Defendants responded and provided some supplementation including emails exchanged between Plaintiff's daughter and Defendants' staff. The parties continued to engage in good faith efforts to resolve this matter, including (a) Plaintiff's proposed compromise for a limited production of personnel files and policies that had been reached in a somewhat similar case involving the same Defendant and defense counsel and (b) Defendants' offer to produce additional documents pursuant to the terms of a protective agreement. Additionally, Defendants continued to supplement their discovery responses, providing additional documents on October 25, 2017. Ultimately, however, Plaintiff rejected Defendants' protective-agreement proposal. Likewise, Defendants rejected Plaintiff's proposed compromise, claiming the earlier case was factually diverse from this case,[5] and refused to provide much of the requested discovery,

---

[4] By order entered September 1, 2017, this Court overruled Defendants' Demurrer to Count II (Punitive Damages) of Plaintiff's Complaint, finding that Plaintiff had "sufficiently pled allegations supporting a punitive damage claim."

[5] Defendants report that they were unable to agree with the proposed compromise because the earlier case, Temes v. CSP Nova LLC, a wrongful death case, involved different facts, a different theory, and very different allegations. The Temes case, Defendants point out, involved a patient's residency in a nursing facility that lasted three years and allegations that poor care during those three years gave rise to a host of medical issues that led to the patient's death. In

including, as Plaintiff points out, "the event report for [Miriam's] fall, staff training in-services, personnel records, electronic records, policies and procedures[,] and . . . information on staffing.

Accordingly, Plaintiff filed the instant Motion to Compel on February 7, 2018, seeking an order from this Court overruling the numerous objections lodged by Defendants in response to Plaintiff's discovery requests and compelling Defendants to respond to those requests. Defendants filed an Opposition to Plaintiff's Motion to Compel on March 27, 2018, asserting that Plaintiff "is not entitled to documents and information that have no relationship to the negligence alleged" and asking the Court to deny Plaintiff's Motion to Compel.

By scheduling order entered February 22, 2018, this matter was placed on the Court's April 3, 2018 docket at 9:00 a.m. for a one-hour hearing on Defendants' Motion to Compel.

A four-day jury trial has been set in this case to commence on July 16, 2018.

**Applicable Standards**

Rule 4:8 deals with interrogatories and provides, in pertinent part, as follows:

> The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 21 days after the service of the interrogatories . . . . The party submitting the interrogatories may move for an order under Rule 4:12(a) with respect to any objection to or other failure to answer an interrogatory.
>
> . . . . Interrogatories may relate to any matters *which can be inquired into under Rule 4:1(b)* . . . .

Va. Sup. Ct. R. 4:8(d) and (e) (emphasis added).

Rule 4:9 deals with requests for production of documents and provides, in pertinent part, as follows:

> Any party may serve on any other party a request . . . to produce . . . any designated documents or electronically stored information . . . which constitute or contain matters *within the scope of Rule 4:1(b)* . . . .

---

this case, Defendants further state, Plaintiff asserts a survival, rather than death, claim; Miriam's residency in the nursing facility lasted only three weeks before her fall on March 1, 2016; and the allegations are restricted to a discrete event, Miriam's fall. Thus, Defendants conclude, "because this case has more narrowly focused facts, the scope of discovery should be . . . narrow[er] than that in the Temes case."

. . . .

> . . . . The party upon whom the request is served shall serve a written response within 21 days after the service of the request, except that a defendant may serve a response within 28 days after service of the complaint upon that defendant. . . . The party submitting the request may move for an order under Rule 4:12(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Va. Sup. Ct. R. 4:9(a) and (b)(ii) (emphasis added).

Rule 4:1(b)(1) provides, in relevant part, as follows:

> *Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action,* whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the *information sought appears reasonably calculated to lead to the discovery of admissible evidence.* Subject to the provisions of Rule 4:8 (g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(Emphasis added.)

Rule 4:12(a) provides, in pertinent part, as follows:

> If . . . a party fails to answer an interrogatory submitted under Rule 4:8, or if a party, in response to a request for inspection submitted under Rule 4:9, fails to . . . permit inspection as requested, the discovering party may move for an order compelling an answer . . . or an order compelling inspection in accordance with the request. . . . If the motion is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the

> motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is denied, the court shall, after opportunity for hearing, require the moving party . . . to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

The grant or denial of discovery requests is within the discretion of the circuit court, and is reversible only where the court's action is "improvident and affect[s] substantial rights." Nizan v. Wells Fargo Bank Minn. Nat'l Ass'n, 274 Va. 481, 500 (2007); Rakes v. Fulcher, 210 Va. 542, 546 (1970).

**Analysis**

As indicated above, Rule 4:12(a) authorizes a party to seek order compelling discovery if a party fails to answer interrogatories or properly respond to document requests. Under Rule 4:12(a)(3), an evasive or incomplete answer is a failure to answer. A prevailing party on a motion to compel is entitled to proper responses and an award of its attorneys' fees under Rule 4:12(a)(4).

Here, as mentioned above, Plaintiff seeks an order from this Court overruling the numerous objections lodged by Defendants in response to Plaintiff's discovery requests and compelling Defendants to respond to those requests. The documents and information requested are relevant, Plaintiff argues, because the fall by Miriam that is at the core of this case implicates administrative issues involving inadequate staffing and staff training as well as issues related to patient neglect in a skilled care nursing setting.

Defendants, on the other hand, assert that Plaintiff's Motion to Compel should be denied because the documents and information requested by Plaintiff "have no relationship to the negligence alleged" in connection with the isolated incident of Miriam's fall. "The discovery rules," Defendants argue, "should not allow vague allegations relating to matters insufficient to demonstrate a breach in the standard of care to dictate the boundaries of discovery." Thus, Defendants further argue, Plaintiff "should not be allowed to base discovery requests on allegations that implicate theories which would never demonstrate the elements of negligence." Defendants' argument continues as follows:

> Much of what Plaintiff seeks to compel is neither relevant to the negligence survival claim nor reasonably calculated to lead to the discovery of admissible evidence. To the extent Plaintiff responds

> by suggesting the matters are raised in the Complaint, it is undisputed that the core allegation of negligence is founded on the March 1 fall and therefore to be discoverable, the requested information must either be relevant to establishing negligence respecting the fall or reasonably calculated to lead to the discovery of evidence admissible to prove negligence.

While I generally agree with Defendants' assertion that, to be properly discoverable, the requested information or document "must either be relevant to establishing negligence respecting the fall or reasonably calculated to lead to the discovery of evidence admissible to prove negligence," I do not agree with Defendants' assertion that the documents and information sought in Plaintiff's discovery requests "is neither relevant to the negligence survival claim nor reasonably calculated to lead to the discovery of admissible evidence." In my opinion, in suggesting that Plaintiff's discovery requests transcend the proper scope of discovery, Defendants rely on a much too narrow reading of the applicable discovery principles. Indeed, as indicated above, Virginia law contemplates a rather liberal application of discovery rules in civil cases, allowing the discovery of any information that "is relevant to the subject matter involved in the pending action" or that is "reasonably calculated to lead to the discovery of admissible evidence." Va. Sup. Ct. R. 4:1(b)(1). In Virginia, "[a]ll relevant evidence is admissible except as otherwise" excludable under the law. Va. R. Evid. 2:402(a). It is well established in Virginia that "[e]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant." Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 260 (1999). "Evidence is relevant if it has any logical tendency, however slight, to establish a fact at issue in the case." Ragland v. Commonwealth, 16 Va. App. 913, 918 (1993) ; see also Rule 2:401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence."). Here, the records and information requested are vital to determine the care Miriam received during her stay at Potomac Falls and to determine the causal effect, if any, that such care had on Miriam's fall and resultant injuries. Thus, in my view, the documents and information sought in Plaintiff's discovery requests are directly relevant to Plaintiff's theories of liability, and Defendants' attempt to narrow the scope of discovery is not well taken.

In discussing the propriety of Plaintiff's discovery requests, the parties conveniently break those requests down into several overall categories: (1) Medical Information Relating to Miriam, (2) Training Materials and Policies and Procedures, (3) Personnel Files of the Staff Members who Cared for Miriam, (4) Information about Prior Complaints and Staffing Problems, (5) Financial and Operational Documents, and (6) Interrogatories. The Court adopts the same categories in its analysis below.

1. Medical Information Relating to Miriam

Plaintiff seeks to compel Defendants' production of their complete medical records relating to Miriam's stay in Potomac Falls, including all records, electronic data reports, notes, videos, photos, orders, tests, as well as recorded statements, commentaries, reports, notes, interviews or other communications relating to either Miriam, any friend, or Hirsch family member. Plaintiff

admits that Defendants did produce the written chart, but asserts that Defendants "failed to produce other documents regarding [Miriam's] care and the fall at issue," including incident or event reports and other investigative reports, and electronic medical records.

Defendants assert in response that, notwithstanding their previously noted objection that some of the information sought by Plaintiff is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence," they have produced all medical information relating to Miriam. "There is," Defendants declare, "no medical information regarding Miriam Hirsch that has not been produced." They add that "[t]he only other document which may fall within the broad description of requested information [that they have not produced] is the event report," which they would have produced had Plaintiff agreed to a protective order." Nevertheless, Defendants further add, even though the "document itself is not discoverable as it would not prove or disprove whether Potomac Falls breached the standard of care with respect to Miriam Hirsch on March 1, 2016," the "factual description of what occurred as contained in the event report has been provided to Plaintiff."

Consequently, the Court will first need to determine what, if any, requested medical records regarding Miriam's stay in Defendant's facility have not been produced by Defendants. Plaintiff refers specifically only to incident or event reports and other investigative reports, and electronic medical records.

With respect to the referenced event report,[6] Defendants' claim that that document "is not discoverable as it would not prove or disprove whether [Defendants] breached the standard of care with respect to Miriam" is unsound. As noted above, information need only be "relevant to the subject matter involved in the pending action" or "reasonably calculated to lead to the discovery of admissible evidence" to be properly discoverable. Va. Sup. Ct. R. 4:1(b)(1). Given that "[e]vidence is relevant if it has any logical tendency, however slight, to establish a fact at issue in the case," this standard is a far easier criterion to satisfy than Defendants' suggestion that it need be factually dispositive to be discoverable. Ragland, 16 Va. App. at 918. Thus, the Court will need to decide if the information contained in the referenced event report and any other investigative reports is relevant to Plaintiff's claims.

Moreover, to the extent Defendants claim the referenced event report is privileged, they would need to provide a privilege log. Va. Sup Ct. R. 4:1(b)(6)(i) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."). To date, no such privilege log has been provided by Defendants. Thus, the privilege objection is overruled.[7]

---

[6] As best the Court can tell, the Court has no access to this referenced document at this point.

[7] As Plaintiff points out, Defendants have not asserted a quality assurance privilege under Code § 8.01-581.16 or Code § 8.01-581.17. Thus, no analysis under those statutes is necessary.

Additionally, with regards to Defendants' apparent contention that a protective order would be needed before the referenced event report could be produced, it is first worth noting that no such request for a protective order is presently before the Court. If such a request were made, the Court would need to determine whether good cause for such an order has been shown. Rule 4:1(c) provides in pertinent part that,

> [u]pon motion by a party . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that . . . confidential . . . information not be disclosed or be disclosed only in a designated way.

To date, Defendants have offered no reason for maintaining the confidentiality of the information contained in the referenced event report. Plaintiff implicitly asserts that no such need exists.

Furthermore, with respect to the requested electronic medical records, Defendants objects to the production of those records on the ground that the request is "intrusive" and seeks information that is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." As discussed above, this objection is without merit. All of Miriam's medical records pertaining to her stay at Potomac Falls are relevant to Plaintiff's negligence claim arising from Miriam's fall. Moreover, the requested electronic data regarding Miriam's care, including the audit trails and metadata associated therewith, constitute a part of her medical records to which Plaintiff is entitled pursuant to Code § 8.01-413.[8] This electronic data is a requisite complement to Miriam's physical medical records and represent the only means by which Plaintiff can verify the integrity of those records. In addition, Defendants have failed to explain precisely how the production of such electronic data is "intrusive" or would otherwise constitute a burden.

For the above reasons Defendants are compelled to produce the complete medical records in their possession relating to Miriam's stay in their facility to the extent they have not yet done so.

2. Training Materials and Policies and Procedures

---

[8] Code § 8.01-413 provides, in pertinent part, as follows:

> B. Copies of a health care provider's records or papers shall be furnished within 30 days of receipt of such request to the patient, his attorney, his executor or administrator, or an authorized insurer upon such patient's, attorney's, executor's, administrator's, or authorized insurer's written request . . . .
>
> B1. A health care provider shall produce the records or papers in either paper, hard copy, or electronic format, as requested by the requester.

Plaintiff seeks to compel Defendants' production of information regarding on the job training provided to the Potomac Falls' staff and the internal polices they were expected to follow in providing care to residents. Specifically, Plaintiff seeks production of training materials provided to nurse aides and nurses who cared for Miriam on the day she fell regarding fall prevention, use of bed alarms, hygiene, resident feeding, weight loss, admission and discharge, resident toileting, charting, staffing, and responsible party and physician notification, as well as guidelines, rules, protocols, and/or policies involving staff by-laws, licensing authority standards, resident assessment, fall prevention, care planning, nutrition, weight loss, eating assistance, hygiene, charting and documentation, and use of bed rails, restraints, bedside commodes, bed alarms, and floor mats, in effect during Plaintiff's stay at Potomac Falls.

Defendants objected to these requests on the ground that "[p]olicies and procedures are not discoverable" or the ground that the requests are "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." Defendants further argue that "[p]olicies, procedures and training materials related to licensing information, nutrition, weight loss and eating . . . have nothing to do with the alleged fall."

While the Court may agree with Defendants respecting Plaintiff's request for licensing information, Defendants miss the mark in terms of the relationship between nutrition, weight loss, and eating and Miriam's ability to get out of bed for the purpose of toileting herself when no assistance in that regard is forthcoming. Clearly, the less she eats and the lighter she becomes during her stay at Potomac Falls, the less strength she will have to support herself when forced to get out of bed by herself to use the bathroom. Likewise, the issues of fall prevention, use of bed alarms, hygiene, admission and discharge, resident toileting, charting, staffing, responsible party and physician notification, resident assessment, care planning, and the use of bed rails, restraints, bedside commodes, bed alarms, and floor mats are all potentially relevant to the question of Defendants' liability for any damages suffered by Miriam as a result of her fall at Potomac Falls. At the very least, Plaintiff's discovery requests regarding those issues may reasonably lead to the discovery of admissible evidence. Although Defendants' alleged negligence may have resulted in a "single discrete event"—i.e., Miriam's alleged fall—the scope of Defendants' negligence is clearly not limited to the precise moment of the fall itself, notwithstanding Defendant's apparent claim to the contrary. It potentially extends to the entire period of Miriam's stay at Potomac Falls and to all aspects of the care she received, or did not receive, during that stay. Thus, while, as Plaintiff concedes, policies and procedures that constitute private rules may not be admissible for purposes of determining the standard of care in a negligence case, see Pullen & McCoy v. Nickens, 226 Va. 342, 350-51 (1983), they are "at least . . . subject to discovery, if not admissible," Estate of Curtis v. Fairfax Hosp. Sys., 21 Va. Cir. 275, 278 (1990).

Indeed, as the Court cogently explained in Curtis:

> [T]he materials sought may not arguably constitute private rules at all, as the term is used in Pullen . . . . The materials sought may properly be seen as reflecting widely-adopted standards established or required by third-party entities . . . . Thus, to the extent the hospital's policies and protocols are reflective of industry custom

> and even state-wide practices, they may be distinguished from the purely private rules held inadmissible by the Supreme Court in Pullen.
>
> However, the defendant's arguments concerning the admissibility of this material is an issue which need not be definitely resolved to permit discovery to proceed since evidentiary admissibility is not at issue in a motion to compel discovery. Rather, Virginia Supreme Court Rule 4:1(b)(1) provides in pertinent part that the "parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action" and "it is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The trial court is given broad discretion to determine whether the material sought may lead to discovery of admissible information.
>
> Logically, the hospital's rules, regulations, and protocols can lead to discovery of admissible evidence on a myriad of issues. As claimant points out, the information will likely permit a more thorough and effective examination of the defendants and their expert witnesses about the medical care provided to the plaintiff, particularly in light of the applicable standard of care. In addition, the policies and procedures also can aid in the discovery of other reports or records generated by parties to the litigation or by other witnesses which may be admissible. The documents also can assist in understanding what the defendants knew or should have known about claimant's condition and when they knew it.

21 Va. Cir. at 279-80. The same rationale applies here. Hence, the requested training materials and policies and procedures are relevant or reasonably calculated to lead to the discovery of admissible evidence and are thus discoverable in this case.

For the above reasons, Defendants are compelled to produce the requested training materials and policies and procedures to the extent they have not yet done so.

3. Personnel Files of the Staff Members Who Cared for Miriam

Plaintiff seeks to compel Defendants' production of the personnel files for the Potomac Falls' staff members who were responsible for caring for Miriam and for overseeing her care on the day of her fall and those that were involved in her care planning related to fall prevention. Such files, Plaintiff asserts, "contain a wealth of discoverable evidence, including, *inter alia*, position descriptions, employee evaluations, disciplinary information, orientation and complete in-service records for training." Plaintiff further asserts that such files may also contain complaints by staff

that "the nursing home is understaffed" or that otherwise corroborate the written complaints submitted to Potomac Falls' staff by Vicki Beth Hirsch about Miriam's care.

In a letter dated October 25, 2017, Defendants identified the names of those individuals who participated in caring for Miriam. However, Defendants object to producing the requested personnel files on the ground that they are "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence."[9]

Defendants' objection is without merit. Indeed, Defendants again appear to conflate discoverability with admissibility and focus inappropriately solely on the isolated incident of Miriam's fall. As noted above, one of the central issues in this case is Plaintiff's allegation that Defendants "provided staffing which was insufficient in . . . training to meet the needs of their nursing home residents, including the needs of [Miriam]." Plaintiffs are thus entitled to know what training was received by the staff members who were responsible for monitoring Miriam's condition, providing care to meet her basic daily needs, and planning her care with regards to fall prevention. Such information would no doubt be in the requested files. That information, as well as the other information possibly in those files cited above by Plaintiff, is clearly relevant with respect to Plaintiff's negligence and punitive damages claims.

For the above reasons, Defendants are compelled to produce the requested personnel files to the extent they have not yet done so. Counsel are encouraged to submit an appropriate protective order regarding the personnel files or, alternatively, forthwith schedule the matter for argument.

4. Information about Prior Complaints and Staffing Problems

Plaintiff seeks to compel Defendants' production of similar complaint information regarding, *inter alia*, falls, resident hygiene, resident admission or discharge, and inadequate staffing, and fall data that Defendants kept on patients from 2014 through March 2016, with patient names redacted. Plaintiff also sought the production of information on census and patient acuity, which is relevant to determine what Defendants' staffing levels should have been during the relevant time period.

Defendants object to producing the requested information regarding prior complaints and staffing on the ground that such information are "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." "The standard of care," Defendants assert, "is situation specific and dependent of factors present at the time." Thus, Defendants further assert, "even if one of the caregivers assigned to [Miriam] on the date of the fall had been reprimanded previously for failing to properly care for a resident this reprimand would not be admissible to show she was negligence in her dealings with [Miriam] on March 1, 2016." Likewise,

---

[9] Defendants previously also objected to the requested personnel files on the ground that the requests seek "private and confidential information." Defendants appear to have abandoned that ground as they did not raise it in their Opposition. Nevertheless, Plaintiff "has no objection to entering into a protective order to address Defendants' confidentiality and privacy concerns."

Defendants also assert, "[t]he number of nurses or certified nursing assistants on duty does not show the nature and quality of care given to [Miriam]."

For the same reasons as stated above, Defendants' objections, which again are focused solely on the isolated incident of Miriam's fall, are, in my view, without merit. As Plaintiff points out, evidence of prior complaints is relevant to show notice or knowledge of a dangerous condition or defect. See Ford Motor Co. v. Phelps, 239 Va. 272, 276 (1990) (holding that evidence of similar prior complaints "will be received to establish that defendant had notice and actual knowledge of a defective condition").

Indeed, in Crouse v. Med. Facilities of Am. XLVIII, 86 Va. Cir. 168, 179-80 (2010), the trial court held that evidence "that bed alarms were not being properly implemented at other facilities" in Virginia provided notice of that condition to the defendants. 86 Va. Cir. at 179. "Far from being 'irrelevant,'" the court observed, the evidence was "probative of whether Defendants had notice and actual knowledge of similar incidents of inadequate bed alarm use at other facilities." Id. Thus, the court concluded,

> [t]he jury could properly infer from this testimony that Defendants had notice of inadequate bed alarm use in MFA facilities prior to [the plaintiff's] fall. Further, given that bed alarms were an "important part of safety and fall prevention," notice that bed alarms were not being used also put Defendants on notice that the defect could lead to falls like [the plaintiff's].

Id. at 179-80.

It is clear, therefore, that prior complaints regarding similar incidents are relevant, at least for purposes of discovery, to establish that a facility had notice of a defective or dangerous condition prior to the subject injury.[10]

---

[10] Relying on Stottlemyer v. Ghramm, 268 Va. 7, 12 (2004) (holding that "the circuit court did not err by denying plaintiff's attempts to cross-examine Dr. Ghramm about his alleged prior acts of misconduct and negligence relating to his former patients" because that "collateral evidence would have distracted the jurors from the issues of Dr. Ghramm's alleged negligence, and such evidence would have excited prejudice and misled the jurors"), Defendants argue that "[i]nformation about prior bad acts is not admissible to show that the same conduct occurred on a particular date." In relying on the Virginia Supreme Court's holding in Stottlemyer to support their argument in the context of the instant discovery dispute, Defendants are again focusing inappropriately on the admissibility of evidence at trial rather than on its relevance for purposes of discovery. Here, the admissibility of the evidence sought by Plaintiff is not presently at issue. Instead, as noted above, the pertinent question before the Court in the instant context is whether the information sought by Plaintiff is either "relevant to the subject matter involved in the pending action" or "reasonably calculated to lead to the discovery of admissible evidence." Va. Supt Ct. R. 4:1(b)(1). Indeed, "[i]t is not ground for objection that the information sought will be inadmissible at the trial." Id. Thus, the question of the admissibility of the evidence sought by

Evidence of prior complaints is also relevant to show that conduct previously engaged in may be repeated. WTAR Radio-TV Corp. v. City Council of Virginia Beach, 216 Va. 892, 895 (1976) ("A previous course of conduct may raise an inference that such conduct will be repeated.").

Likewise, despite Defendants' claims to the contrary, information regarding staffing at Potomac Falls in other parts of the facility on the day in question and on other days at the facility is relevant to the issue of whether Defendants had adequate staffing to meet Miriam's basic daily living needs at the time of the subject fall.

Hence, the information sought by Plaintiff is subject to discovery, regardless of whether it is ultimately admissible at trial. Accordingly, Defendants are compelled to produce the requested information about prior complaints and staffing at Potomac Falls to the extent they have not yet done so.

5. Financial and Operational Documents

Plaintiff seeks to compel Defendants' production of Defendants' balance reports, 10ks, annual operating expenses, financial statements, and tax returns.[11] Plaintiff asserts that, given that Defendants' demurrer to Plaintiff's punitive damages claim has been overruled, such information is appropriate to explore Defendants' net worth and each Defendant's role in Potomac Falls, a joint venture, and the true nature of their business relationship.

Defendants object to producing the requested financial and operational documents on the ground that such information "would not prove facts sufficient to support a punitive damage claim" and "would only become relevant if an award of punitive damages was deemed appropriate after all of the evidence was received." Thus, Defendants conclude, "the motion to compel discovery of the financial and related information should be denied at least until the ruling on Defendants' anticipated motion for summary judgment and more likely until after the court rules on a motion to strike plaintiff's evidence at trial."

It appears that Defendants, in essence, are seeking, for discovery purposes, to bifurcate the issues of liability and the issue of punitive damages. Indeed, while Defendants appear to acknowledge that the requested information is relevant to a determination of punitive damages, see Norfolk & W.R. Co. v. A.C. Allen & Sons, 122 Va. 603, 615 (1918) (holding that in a case in which punitive damages are recoverable, the plaintiff may present evidence of the defendant's wealth), they assert that the discovery of that information should only be conducted once it is found at trial that punitive damages are allowable. Such a procedure, however, is neither procedurally practicable nor appropriate under the alleged circumstances of this case. First, Defendants' suggested bifurcation of discovery would require that discovery be re-opened after the jury has

---

Plaintiff is not now before the Court, notwithstanding Defendants' repeated attempts to make it appear so.

[11] Plaintiff "has no objection to including these financial records within the coverage of a protective order."

found, based on the evidence presented at trial, that punitive damages are appropriate. Such a delay would likely require the need for a second, different jury to hear the evidence on damages, if the parties were unwilling to allow the Court to determine punitive damages. Needless to say, any such delay in order to reopen discovery and then rehear much of the case would be burdensome and inefficient. Defendants provide no actual reason, much less a compelling one, for putting the parties, Court, and any additional jury through such an ordeal. Moreover, there is no motion to bifurcate currently before the Court. Until such a motion is made and heard, Defendants' argument is moot. Second, as Plaintiff suggests, the information sought by Plaintiff, who has alleged that Defendants "were engaged in a joint venture," is necessary to determine each Defendant's role in the operation of Potomac Falls. Hence, such information would clearly be relevant to the issue of each Defendant's specific percentage of liability.

Accordingly, for the above reasons Defendants are compelled to produce the requested financial and operational documents to the extent they have not yet done so. Counsel are encouraged to submit an appropriate protective order covering the financial and operational documents, or forthwith schedule the matter for argument.

6. Interrogatories

Plaintiff assert that Defendants' responses to certain Interrogatories are deficient as follows:

- Interrogatory No. 3: Defendants fail to provide contact information for staff listed in their response to said interrogatory. Defendants object that the request is overbroad and irrelevant.

- Interrogatory No. 6: Defendants fail to provide all the information they know about the fall at issue, including what Miriam told them about why the fall occurred. Defendants object that the request is overbroad and irrelevant.

- Interrogatory No. 8: Defendants fail to confirm the requests that Vicki Beth Hirsch made on Miriam's behalf, including that a bed alarm be used for her mother. Defendants object that the request is vague, overbroad, and irrelevant.

- Interrogatory No. 11: Defendants fail to state what guidelines or training on fall prevention was provided to Miriam's direct care staff. Defendants object that policies and procedures are not discoverable and that the request is irrelevant.

- Interrogatory No. 16: Defendants fail to state what additional information is kept separate in their electronic charting. Defendants object that the request is vague, overbroad, and irrelevant.

- Interrogatory No. 18: Defendants fail to state whether there were any fall prevention interventions that were provided to Miriam that were not included in the chart. Defendant objects that the request is overbroad and irrelevant.

- Interrogatories No. 19 and 20: Defendants fail to provide information regarding their staffing levels at Potomac Falls between February 18, 2016, and March 1, 2016. Defendants object that the requests are irrelevant.

Defendants now declare in response to Plaintiff's Motion to Compel only that they have answered the referenced Interrogatories. They add, however, that the "additional staffing information" requested in Plaintiff's interrogatories "is not discoverable" because that "information will not prove an element of negligence related to [Miriam's] fall nor will it lead to the discovery of admissible evidence."

For the same reasons as stated above, Defendants' objections, which again are chiefly centered on the isolated incident of Miriam's fall, are, in my view, without merit. As noted above, notwithstanding Defendants' assertion to the contrary, information regarding staffing at Potomac Falls is relevant to the issue of whether Defendants had adequate staffing to meet Miriam's basic daily living needs at the time of the subject fall.[12]

Accordingly, Defendants' objections are overruled and Defendants are compelled to provide full and complete responses to the aforementioned Interrogatories, to the extent they have not yet done so.

For the reasons set forth in this Letter Opinion, the Plaintiff's Motion to Compel is granted. On all matters to which the Court compelled responses, the Defendants shall respond within twenty-one (21) days from the date of this Letter Opinion.

IT IS SO ORDERED.

Counsel's objections are preserved.

Cordially,

Douglas L. Fleming, Jr.
Circuit Court Judge

Signatures dispensed with pursuant to Rule 1:13

[12] It is also worth noting that, with respect to their claims that Plaintiff's Interrogatories are "overbroad," Defendants fail to show that Plaintiff's discovery requests are either "unreasonably cumulative or duplicative" or "unduly burdensome or expensive." Va. Sup. Ct. R. 4:1(b)(1).