VIRGINIA: IN THE CIRCUIT COURT OF FAIRFAX COUNTY

 )

**Sara A. McCorkle**, by and through her )

Next Friend, Allen D. McCorkle )

 )

 Plaintiff )

 )

 v. )

 )

**Erickson Senior Living LLC,** *et al.*  ) Law No. CL22-4439

 Defendants )

 )

**Plaintiff’s Memorandum in Opposition to**

**Defendants’ Demurrer and Responsive Pleadings**

 COMES NOW Plaintiff, by counsel, and files, her Memorandum in Opposition to

Defendants’ Demurrer and Responsive Pleadings, and in support thereof, states as follows:

1. **Summary of Argument**

Virginia is a notice pleading state. A complaint will survive demurrer if it is drafted so that the defendant is on notice of the nature and character of the claim.[[1]](#footnote-1)

Plaintiff filed her Second Amended Complaint to add additional facts revealed in discovery which further bolster her claims of negligence, breach of contract and punitive damages. Realizing the futility of challenging whether Plaintiff pled a viable cause of action in contract or tort, Defendants demurred only to Plaintiff’s consumer protection claim in responding to Plaintiff’s initial complaint. On June 24, 2022, Judge Leary overruled the demurrer, finding that Plaintiff had pled sufficient facts to make out a claim under Virginia’s Consumer Protection Act. With the same essential facts pled in the VCPA claim, Defendants now seek to reargue the legal issue of whether a VCPA claim can be pled in the context of an assisted living negligence case.[[2]](#footnote-2)  This argument, which is contrary to established case law, was previously rejected by the Court and is now the law of the case.

1. **Argument**
2. **Numerous Courts, Including this One, Have Held that a Virginia Consumer Protection Claim Can be Asserted Against Healthcare Providers**

Healthcare providers have no immunity from claims that are not premised on malpractice. In *Humphrey v. Leewood Healthcare Center*, Plaintiff pursued a VCPA claim based on Plaintiff’s elopement from a skilled nursing facility. 73 Va. Cir. 346 (Fairfax 2007)(Exh. No. 1). This Court found that nursing home care could constitute a service, sufficient to bring it under the scope of the VCPA.[[3]](#footnote-3) The Court also found that Plaintiff’s claim was not barred because of nursing home regulations that authorized the conduct at issue, including the Virginia Medical Malpractice Act. (VMA). Consistent with *Humphrey*, this court has also held that a Plaintiff could pursue separate fraud claims in medical malpractice cases.[[4]](#footnote-4)

In *Beaty v. Manor Care, Inc.*, the Court found that a VCPA claim was stated against an assisted living facility that failed to protect a resident from an assault.2003 WL 24902409 (E.D. Va. 2003)(Exh. No. 2). In *Beaty*, Defendants made similar arguments that Defendants make here: that as an assisted-living facility regulated by the Virginia Department of Social Services, it is exempt from the VCPA under *Va. Code § 59.1-199(A).*  The *Beaty* Court held that while *Va. § 59.1-199(A)* exempts claims arising from certain transactions that are already covered by Virginia or Federal law, it did not exempt entire industries from the VCPA. *Id*.[[5]](#footnote-5)

1. **Plaintiff’s VCPA Claim is Not Subject to Preemption or Exclusion**

Defendants apparently rely on Va. Code § 59.1-199, which excludes VCPA claims where the particular aspect of the consumer transaction at issue “is authorized under laws or regulations of this Commonwealth or the United States, or the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States.” Defendants cite no statute or regulation authorizing the misrepresentations of this case.[[6]](#footnote-6)  Moreover, while Defendants appear to argue that all medical malpractice claims are preempted by the Virginia Medical Malpractice Act, they conveniently ignore *Alcoy v. Valley Nursing Home*, Inc. 272 Va. 37, 43, 630 S.E.2d 301, 304(2006), which found that a facility’s administrative, personnel, security and staffing decisions are not “health care” for purposes of Virginia’s medical malpractice act.[[7]](#footnote-7)

1. **Plaintiff Has Alleged Sufficient Facts to Support a Punitive Damage Claim**

Likely realizing the futility of challenging Plaintiff’s claim for punitive damages, Defendants did not demure to this claim when responding to Plaintiff’s first complaint. Plaintiff’s Amended Complaint has even more supporting allegations that have been revealed in discovery, further bolstering her punitive claim.

Plaintiff alleges both intentional and reckless conduct that this Court must assume is true for purposes of this Motion. Defendants “intentionally misrepresented” the nature of available services and misinformed the family that there was sufficient staffing to meet Sara’s needs. (Amended Complaint, ¶¶ 49, 50). They “recklessly placed her in a unit that did not have a working call bell system.” *Id*., 50. The demented Ms. McCorkle liked to take hot showers, but could not get water in her ear because of a missing ear drum. *Id*., ¶ 13. Although Defendant’s own care plan required hands-on assistance with toileting and bathing, and they were repeatedly warned that she was getting up in the early morning to self-bathe and toilet, Defendants “recklessly ignored this risk as well as the family’s complaints of neglect. . .” *Id*., ¶¶ 51, 52.

Virginia courts have allowed punitive damage claims to go forward on far less egregious factual allegations than those presented here. *See Alfonso v. Robinson*, 257 Va. 540 (1999) (punitive damages allowed where defendant failed to place safety flares behind his disabled truck); *Smith v. Litten*, 256 Va. 573 (1998) (punitive damages allowed where defendant discriminated against an employee because of his age); *Rice v. Safford Dodge Inc.,* 43 Va. Cir. 578 (1997) (punitive damages allowed where defendant sold a vehicle claiming that the car was a demonstrator model when it was actually a damaged car that had been repaired); *Kaufmann v. Abramson*, 363 F.2d 865 (4th Cir. 1966) (punitive damages award sustained for a landlord’s cutting off a lessee’s electricity despite his awareness of elderly lessee’s frail health).

In *Crouse v. Medical Facilities of America*, CL 09002319 (Roanoke 2013)(Exh No. 4), the Supreme Court found no error in the trial court upholding a punitive damage claim which was based, in part, upon Defendant’s prior survey record that showed bed alarms were not being properly implemented in other facilities, which put them on notice that such failures could lead to falls by Plaintiff. Like *Crouse*, Plaintiff has alleged similar prior deficiencies in has also alleged that Defendants were on notice of similar prior deficiencies including failures in service planning, failures to timely toilet a resident who required physical assistance and failing to report incidents to their licensing authority that negatively affected or threatened the life, health or safety of their residents. (Amended Complaint, ¶¶ 59-62).[[8]](#footnote-8)

 Here, Plaintiff alleges that Defendants knew they did not have adequate staffing

Finally, Defendants’ conduct in attempting to cover-up their neglect provides additional support for punitive damages. After she was burned in the shower while bathing alone, Defendants engaged in a cover-up where they sought to document incriminating information in an incident report[[9]](#footnote-9) and purposely failed to pass on critical information to Fairfax Hospital about how her burn blisters actually developed. ¶ 54. In a further effort to cover up the truth, Defendants failed to report this incident to their licensing authority.[[10]](#footnote-10)  Cases from various jurisdictions have upheld punitive damages against healthcare providers or other professionals when they have improperly attempted to conceal their conduct.

Cases from various jurisdictions have upheld awards of punitive damages when healthcare providers have attempted to cover up their negligent conduct.[[11]](#footnote-11) Such conduct is also relevant to ratification and establishing direct action by the corporate entity.

1. **Plaintiff Has Adequately Pled Direct Action by the Corporate**

**Defendants Sufficient to Establish Direct Action and Ratification**

 Defendants argue that there are insufficient allegations to establish direct liability against them. **Such an argument is misplaced and not appropriately resolved on demurrer, where Plaintiff has properly pled both joint venture liability and vicarious liability.**

Not clear what relief the Defendants are seeking here

Despite multiple allegations devoted to the numerous ways that Defendants ratified such punitive conduct, Defendants misleadingly argue that Plaintiff has failed to state “any factual allegations that Defendants participated or authorized the alleged negligent acts in Plaintiff’s Amended Complaint at the corporate level.” *Id*. at 11.[[12]](#footnote-12) As a threshold issue, only slight acts of ratification are necessary to support a claim of punitive damages against a principal. 22 Am. Jur. 2d, § 789 (1988), citing, *Norfolk & W.R. Co v. Anderson*, 90 Va. 1, 17 S.E. 757 (1893)(Ratification found based on the general passenger agent’s refusal to honor Plaintiff’s train ticket after he was kicked off the train by the conductor).

 Here, Plaintiff has also alleged direct action in the facility’s failure to provide sufficient staffing to meet Ms. McCorkle’s needs, along with failures of Manager, Don Wright, to modify Plaintiff’s care plan to address her dangerous behaviors in attempting to self-bath and toilet without assistance.[[13]](#footnote-13) (Amended Complaint, ¶¶ 13, 16, 24 & 32(j)). As the attached organization chart of Greenspring reflects, there is no person higher than the Administrator within the Greenspring organization. (Exh. 5).

 Under Virginia law direct action and ratification can be established by showing misconduct of the administrator or management staff.[[14]](#footnote-14)  In *Egan v. Butler*, 290 Va. 62, 772 S.E.2d 765 (2015) the Virginia Supreme Court, relying on the Restatement (Second) of Torts, considered the discrete issue of what would constitute actual participation in misconduct, sufficient to render a company liable for punitive damages. **The Supreme Court found that where an individual was employed in a managerial capacity and acting within the scope of his employment, this was sufficient to establish participation and ratification**.[[15]](#footnote-15) (Emphasis added). Similarly, where such the corporation was aware of such misconduct, it can be found liable for punitive. *Jordan v. Suave*, 219 Va. 448, 247 S.E.2d 739 (1978)(Car dealership that knew of salesman’s fraud would be liable for punitive damages).

1. **Negligence Per Se is Not a Separate Cause of Action Subject to Demurrer**

In her initial complaint Plaintiff alleged the violation of assisted living regulations which

her experts will explain set standards of care for Greenspring. Plaintiff amended her complaint to add additional supporting facts as revealed in discovery and assure that the Defendants would not be able to claim surprise when Plaintiff sought jury instructions based on these regulatory standards. Defendants made the same argument in opposing the Motion to Amend, which was implicitly rejected by this Court when it allowed Plaintiff to amend the complaint to include negligence per se allegations.

 Defendants ignore the fact that the regulations themselves reflect that they are “standards for licensed assisted living facilities” and that the preamble to these regulations state that “[t]he purpose of these regulations is to set minimum and reasonable standards for licensure of assisted living facilities.” (Exh. No. 6)

 The doctrine of negligence per se represents the adoption of "the requirements of a legislative enactment as the standard of conduct of a reasonable [person*]." Butler v. Frieden*, 208 Va. 352, 353, 158 S.E.2d 121, 122 (1967)(While a Norfolk dog leash ordinance did not establish a private cause action, it set a standard of conduct that was relevant in determining whether Defendant was negligent). When applicable,[[16]](#footnote-16) the violation of a statute or municipal ordinance adopted for public safety constitutes negligence because the violation is the failure to abide by a particular standard of care that has been prescribed by law. *Moore v. Virginia Transit Co*., 188 Va. 493, 497-98, 50 S.E.2d 268, 271 (1948).

 In *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 597 S.E.2d 43 (2004), Plaintiff was injured when he was shot by a member of the Hunt Club, Cofield, who was later charged with recklessly handling a firearm in violation of Va. Code § 18.2-56.1(A). Defendant argued that Cofield’s conviction was not conclusive evidence of negligence in the civil case and that a negligence per se instruction was not warranted. The trial court agreed and denied the instruction. The Supreme Court reversed, noting that Plaintiff had established that he was in the protected class and that the harm was the type against which the statue was designed to protect against. Whether the alleged violation is one of statute versus regulation is not dispositive.[[17]](#footnote-17)

 Defendant’s reliance of *Cherrie v. Va. Health Servs*, 292 Va. 309 (2016), is unavailing as the Court simply held that the governing statute does not imply a private right of action for the enforcement of a regulation to compel the production of the facilities written policies and procedures. Here, Plaintiff has not pursued a private cause of action based on the regulations. She properly asserts that such regulations set standards that a reasonably prudent assisted living facility must follow. See, *Williamson v. Old Brogue Inc*, 232 Va. 350, 355, 350 S.E.621 (1986)(Explaining that the doctrine of negligence per se does not create a cause of action where not existed, but may define the standard where there is an underlying common law duty).

1. **Plaintiff’s Contract Claim Can be Pursued Concurrently With her Tort Claim**

 Defendants ignore Va. Code §8.01-272, which allows a party to plead multiple claims in the same case. This statute, consistent with well-established case law, states that **“[a] party may join a claim in tort** with one in contract provided that all claims so joined, arise out of the same transaction.” (Emphasis added). If the General Assembly had intended to exempt malpractice claims under this statute, it would have done so.

 As the evidence at trial will show, there were multiple violations of contract (as it relates issues involving the failure to respond to call bells or provide for Plaintiff’s basic ADL needs) that occurred before Plaintiff sustained the shower injury on December 21, 2020. Failures to respond to her call bell, providing toileting and bathing services are some of the failures that resulted in a breach of contract and the family having to remove Sara to keep her safe. While not all of these failures necessary caused injury to Plaintiff, they still constitute a breach of their contractual obligations that caused financial harm to the Plaintiff and explain the context of why the demented Ms. McCorkle was removed from the facility by her family.

 **Defendants fail to alert the Court to the binding precedent of *Glisson v. Loxley*, 366 S.E.2d** 68 (1988), where the Supreme Court considered whether Plaintiff could state a cause of action for breach of contract based on Defendant’s failure to properly perform a diagnostic arthroscopic procedure of her right knee. Having failed to comply with the notice requirements of the Medical Malpractice Act, Plaintiff alleged that she had entered into an oral contract with the physician, which included his agreement not to perform actual surgery, but simply a diagnostic procedure. In rejecting the defense argument that she could only pursue a medical malpractice claim, the Supreme Court explained:

 **We are not persuaded by defendant’s effort to have us hold, in**

 **effect, that because the claim arises in the context of a physician**

 **patient relationship, the action is actually one sounding in tort, is covered**

**by the malpractice statutes and is subject to the notice provision. . .**

And the mere fact that plaintiff has sought recovery for pain and

suffering does not, standing alone, convert this contract claim into an

action in tort.

**Keep in mind that under Alcoy, failures in staffing are not even considered traditional malpractice**

*Id*. 366 S.E.2d at 72. Here, Plaintiff is only seeking economic damages from the contract breach. And the contracts at issue clearly set forth Defendants’ obligations to provide various services, many of which do not even qualify as medical care. See also, *Huffman v. Beverly,* 42 Va. Cir. 205, 1997 Va. Cir. Lexis 113 (Rockingham 1997)(Holding that in the context of a nursing home malpractice case, a fair reading of *Glisson v. Loxley* is that a medical malpractice case may be premised on both contract and tort)

The dismissal of this contract claim would inject clear, reversible error in this case. And at age 99, Plaintiff will not be alive to try this case twice.

 Wherefore, these and other premises considered, Plaintiff moves this Court for an order denying Defendants’ Demurrer and related issues in their responsive pleadings.

 Dated: February 2, 2022 Respectfully submitted,

 Plaintiff, by Counsel

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**CERTIFICATE OF MAILING**

I hereby certify that a true copy of the foregoing Plaintiff’s Opposition to Defendant’s Demurrers and Responsive pleadings was served upon Defendants, by sending a copy of this Memorandum, with attachments and notice, via e-mail, this 2nd of February 2023, to the following:

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**Exh. No. 1**

**Exh. No. 2**

**Exh. No. 3**

**Exh. No. 4**

**Exh. No. 5**

**Exh. No. 6**

1. 3 See, *Cetercorp, Inc. v. Catering Concepts, Inc.,* 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). [↑](#footnote-ref-1)
2. Defendants made the same argument in their initial demurrer, arguing that if “[p]laintiff’s pleadings were sufficient to state a claim under the VCPA, it would effectively transform every malpractice case into a consumer protection claim.” (Def’s Brief in Support of Demurrer to Plaintiff’s First Complaint, p. 9). [↑](#footnote-ref-2)
3. Defendants do not argue that the transaction involving Plaintiff entering into a contract with Greenspring is not a commercial transaction under the VCPA. Moreover, since assisted living facilities, unlike nursing homes, are not licensed to provide skilled nursing care, their agreed upon services are more analogous to personal services that are even further removed from the scope of traditional malpractice cases involving the provision of medical or skilled nursing services. [↑](#footnote-ref-3)
4. *Dell v. French*, 38 Va. Cir. 91, 97-98 (Fairfax 1995)(Holding that [f]raud, whether actual or constructive, to the extent it is based on purposeful misrepresentations of material facts related to a patient’s care is a separate cause of action from medical malpractice”); *Peterson v. Fairfax Hosp. Sys. Inc*., 31 Va. Cir. 50, 58 (Fairfax 1993)(Holding that the “Medical Malpractice Act does not operate to limit liability for making a false statement . . . even where such a statement is made in the delivery of healthcare services.”) [↑](#footnote-ref-4)
5. A similar result was reached in *McCaulley v. Purdue Pharma*, where Defendants argued that medical providers could not be covered under the VCPA. 172 F.Supp.2d 803 (W.D. Va. 2001). Despite a highly regulated pharmaceutical industry and allegations involving an actual healthcare provider, the Court found that Plaintiff had stated a valid cause of action under the VCPA. The *McCaulley* Court also distinguished *Ott v. Baker*, relied upon by the defense. 53 Va. Cir. 113 (Norfolk, 2000).  *Ott* addressed the licensing of a hospital and legality of an abortion, both of which were governed by other Virginia laws. The Court noted that in contrast to the facts in *Ott*, there was no Virginia law authorizing physicians to make misleading misrepresentations about prescribed drugs and as such, these claims were not excluded from VCPA coverage. See also, *Corrales v. HHC Poplar Springs, Inc*, Judge Teefey in Petersburg overruled Defendant’s Demurrer where Plaintiff had alleged consumer protection violations involving safety and risk management at a mental health facility. Law No. CL 15000378 (Cir. Ct. Peterburg, 2015)(Exh. No. 3). The Court expressly rejected the argument that claim was preempted by Virginia’s medical malpractice act. Id. at p. 5. [↑](#footnote-ref-5)
6. . Unlike the statutes in *Bandy v. Baig,* (Exh. No. 3 to defendant’s brief)that specifically addressed false or misleading advertising for physicians, Va. Code §63.2-1700 *et seq*, as cited by Defendants in support of preemption, is silent on this issue. Similarly, the assisted living regulations that Defendants argue are irrelevant to standards of care, do not specifically address false or misleading disclosures. 22 VAC 40-73-50 does reference certain disclosure requirements regarding information to be provided to prospective residents but does not address false or misleading disclosures. [↑](#footnote-ref-6)
7. Here, Plaintiff has identified an expert administrator to opine on breaches in care which are clearly outside the scope of the Virginia Malpractice Act. [↑](#footnote-ref-7)
8. In *Crouse,* the violations that put the nursing home chain on notice were in different facilities within their chain. Here, the prior violations involved the same facility, rendering them even more probative on the issue of notice. [↑](#footnote-ref-8)
9. The Amended Complaint added the fact that the nurse who did the incident report candidly admitted that the purpose of the report was to document what actually happened to the resident. Amended Complaint, ¶ 53. [↑](#footnote-ref-9)
10. When the McCorkle family later reported this incident, Defendants were invested by the Department of Social Services and were cited for multiple regulatory violations regarding their neglect of Ms. McCorkle. *Id*., ¶¶ 25-29. [↑](#footnote-ref-10)
11. *See Moskovitz v. Mt. Sinai Medical* Center, 60 Ohio St.3d 638, 651, 635 N.E.2d 331 (1994) (upholding an award of punitive damages based on the Defendant doctor’s alleged alteration and destruction of records, even where such conduct did not cause damages independent from the malpractice. “If the act of altering and destroying records to avoid liability is to be tolerated in our society, we can think of no better way to encourage it than to hold that punitive damages are not available in this case.”); *Metcalfe v. Waters,* 970 S.W.2d 448 (Tenn. 1998) (upholding a punitive damage award against attorney who failed to disclose to his client that his case had been dismissed and lied to his client about the status of the matter.); *Houston v. Surrett,* 222 Ga.App. 207, 474 S.E.2d 39, 41 (1996) (finding that an attorney’s concealment and misrepresentation of matters affecting his client’s case will give rise to a claim for punitive damages.); *Nelson v. Gaunt*, 125 Cal. App.3d 623, 178 Cal. Rptr. 167 (1st Dist. 1981) (upholding award of punitive damages against a physician who fraudulently misrepresented the risks and side effects of using an inert substance for breast augmentation, without informing the patient that the substance was silicone, which was known to be unsafe when injected into human tissue). [↑](#footnote-ref-11)
12. In Paragraphs 63 and 64 Plaintiff alleges multiple facts giving rise to ratification including the following: (1) that Defendants’ management staff knew that Garden Ridge was not suited for residents with high acuity , yet intentionally admitted such residents, who were beyond their care abilities, to generate increased profits; (2) that Defendants ratified their employee’s conduct by condoning it and by failing to correct repeated instances of neglect in ways that were substantially similar to Plaintiff’s alleged neglect (as outlined in prior deficiencies summarized in ¶¶ 58 – 63); (3) that Defendants ratified the acts of their employees by intentionally and/or recklessly staffing its facility without a sufficient number of properly trained staff; (4) that they ratified the conduct of their employees by participating in the cover up by failing to report this incident to their licensing authority, by destroying relevant staffing records and 24 hour report and by **condoning corporate practices** in which incriminating information was buried in incident reports and not placed in the patient chart and (5) by attempting to conceal Plaintiff’s injuries by not documenting the manner in which such injuries were sustained and by failing to report this unusual event to their licensing authority. [↑](#footnote-ref-12)
13. Assisted Living regulations require that the service care planning of a resident be actually completed by the Administrator or his or her designee 22 VAC 40-73-450 [↑](#footnote-ref-13)
14. The Supreme Court has also made it clear that ratification will be present where the principal participated in, authorized or ratified the wrongful conduct*. Hogg v. Plant*, 145 Va. 175, 133 S.E. 759 (1926). [↑](#footnote-ref-14)
15. Similarly, in *Johnson v. Shaffer*, 33 Va. Cir. 57 (Warren County 1993), the Court cited the Restatement of Torts, 2d, Damages § 786, as supporting ratification where a managerial agent authorized the doing and the manner of act or the agent was employed in a managerial capacity and was acting within the scope of employment or the managerial agent of the principal ratified or approved the act. [↑](#footnote-ref-15)
16. The trial court determines whether the ordinance was enacted for the public safety and whether the Plaintiff was a member of the class sought to be protected. Virginia Electric & Power Co. v. Savoy Constr. Co., 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982). [↑](#footnote-ref-16)
17. In *Halterman v. Radisson Hotel*., 259 Va. 171, 523 S.E.171 (2000) the Supreme Court considered whether a safety regulation known as the Hazard Community Standard could give rise to negligence per se claim. While the Court decided that Plaintiff had failed to prove an actual violation of the regulation had occurred, it never suggested that the safety regulation could not support a negligence per se claim because it was not a statute. See also, *Marslender v. Virginia Elec. and Power Co*., 37 Va. Cir. 199 (Norfolk 1995)(OSHA regulations admissible to show duty of care owed to employee injured on the job). [↑](#footnote-ref-17)