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V I R G I N I A :
IN THE CIRCUIT COURT OF FAIRFAX COUNTY
- - - - -X
SARA A. MCCORKLE, by and through)
her Next Friend, Allen D. McCorkle)
Plaintiff,) Law No. CL22-4439
v.)
ERICKSON SENIOR LIVING, LLC)
and)
GREENSPRING VILLAGE, INC.)
Defendants.)
- - - - -)

Fairfax, Virginia
Friday, February 10, 2023

HEARING

The above-entitled matter came on for hearing before the HONORABLE MICHAEL F. DEVINE, a Judge in and for the Circuit Court of the County of Fairfax, held in Fairfax County Circuit Court, Courtroom 5F, Fairfax, Virginia, pursuant to notice, beginning at 10:38 a.m., when were present on behalf of the parties:

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of the parties:

1 ON BEHALF OF THE PLAINTIFF:

2 JEFFREY J. DOWNEY, ESQUIRE

3 THE LAW OFFICE OF JEFFREY J. DOWNEY, P.C.

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1 P R O C E E D I N G S

2 (The court reporter was previously sworn by
3 the Court.)

4 THE COURT: We are here in the case of Sara
5 McCorkle against Erickson Senior Living, LLC and
6 others. It is Civil Case Number 2022-4439. Counsel
7 is present.

8 Would counsel please identify themselves for
9 the record?

10 MR. DOWNEY: Good morning, Your Honor. Jeff
11 Downey for the plaintiff.

12 THE COURT: Good morning.

13 MS. FLAGE: Good morning, Your Honor.
14 Jessica Flage on behalf of the defendants.

15 THE COURT: Good morning.

16 MS. FLAGE: And if I might just have a few
17 seconds to get myself situated.

18 THE COURT: You bet. I've got a few
19 documents I want to pull up as well.

20 MS. FLAGE: Perfect.

21 (Pause.)

22 MS. FLAGE: Your Honor, today would you
23 prefer we use the podium, or may I stay at counsel's
24 table?

25 THE COURT: You can stay at counsel's table

1 as long as you're on the microphone. That's fine.

2 Okay. So this comes on the defense motion
3 in limine to exclude evidence regarding state
4 inspections, which occurred I think both prior to and
5 subsequent to the alleged injury here. Right?

6 MS. FLAGE: Yes, that's correct.

7 THE COURT: Okay. Well, let me check with
8 Mr. Downey. Mr. Downey, your theory on this I believe
9 is that this -- let's separate these into two
10 categories. Let's deal with the ones that occurred --
11 the inspections that occurred prior to the date of the
12 incident at issue.

13 MR. DOWNEY: Yes, Judge.

14 THE COURT: Those would be relevant to what
15 issue in the case?

16 MR. DOWNEY: To issues of negligence to the
17 extent that the facility was put on notice of problems
18 with service planning before the incident --

19 THE COURT: How does that go to negligence?
20 Hasn't the Supreme Court explicitly rejected that,
21 that line to say that your failure to do X, Y and Z
22 prior can't be used to show -- you know, your
23 negligence on a prior occasion cannot be used to show
24 that you were negligent on this occasion. Haven't
25 they explicitly rejected that?

1 MR. DOWNEY: No, because it can be created
2 to establish notice as it relates to a potentially
3 dangerous situation. In other words, if the --

4 THE COURT: Sure. I understand that, and
5 that goes to perhaps your punitive damages claim,
6 wouldn't it, but not whether or not negligence
7 occurred. That is, if there was -- you know, to
8 prove -- to get punitive damages, you would have to
9 show conscious disregard.

10 MR. DOWNEY: Correct.

11 THE COURT: Conscious disregard I think
12 requires some understanding that an injury was likely
13 to occur.

14 MR. DOWNEY: Agreed.

15 THE COURT: Okay. I see how this -- it
16 might go to that punitive damages issue, but let's --
17 but you seem to be suggesting that even if you hadn't
18 made a punitive damages claim this would still be
19 admissible?

20 MR. DOWNEY: That would be my position based
21 on the case I cited, the Ford Motor case that said
22 evidence of prior complaints is admissible and
23 probative to prove either notice or knowledge of the
24 dangerous condition or to raise an inference that such
25 prior conduct would be repeated.

1 I think the jury gets an instruction on
2 notice, but to the extent that I can establish as was
3 done in the Crouse case where there was a notice of a
4 prior bed alarm --

5 THE COURT: How does notice play into a
6 determination of negligence? You have to have experts
7 to show that this was a breach of the standard of
8 care.

9 MR. DOWNEY: Of course. I have experts.

10 THE COURT: How does notice play into that?

11 MR. DOWNEY: Because the facility under
12 plaintiff's theory of the case had notice just like in
13 the Crouse case that they weren't properly dealing
14 with an important part of an assisted living process,
15 which is the service plan.

16 So, to the extent that I could show through
17 my expert -- and one of the things that is sort of the
18 elephant in the room in this case is, are they trying
19 to exclude the document itself or all of the
20 underlying information in the document, and that's
21 rather important.

22 THE COURT: Well, that's why I think we're
23 going to confine ourselves. We're going to divide
24 this up into two things.

25 I mean, clearly, I don't think they can

1 suppress information related to the facts of what
2 happened during the incident that's at issue --

3 MR. DOWNEY: True.

4 THE COURT: -- on December whatever date
5 that was.

6 MS. FLAGE: 21.

7 THE COURT: Yeah.

8 MR. DOWNEY: And to clarify, I'm not going
9 to seek admission of the prior surveys as documents.
10 One of the things that plaintiff (sic) fails to alert
11 the Court to is that, while they seek to essentially
12 exclude the McCorkle survey and the prior surveys,
13 they don't inform the Court that I designated the
14 surveyor who did these surveys to lay a foundation.

15 THE COURT: I'm not worried about -- well, a
16 foundation for what? A foundation for the documents,
17 but I don't think it matters --

18 MR. DOWNEY: No. Foundation for the
19 information that is contained in the surveys. I
20 didn't want to agree to --

21 THE COURT: I'm not worried about the
22 hearsay objections, not now. I'm at the bigger
23 picture, which is why are these even -- to what use do
24 you put them at trial, and are they relevant for that
25 purpose? Then we can worry about laying foundations

1 and evidentiary objections.

2 MR. DOWNEY: Sure.

3 THE COURT: But you're saying that this
4 would go to show notice, and notice is part of your
5 proving that they had a duty?

6 MR. DOWNEY: That they were aware that there
7 were prior -- in the Crouse case, the court allowed
8 prior survey violations involving alarms, and that
9 prior survey violation actually involved another
10 facility within the chain.

11 The court found in Crouse that those prior
12 surveys were relevant because they put the facility on
13 notice. They took judicial notice of it. They did
14 not admit the actual surveys.

15 It went up to the Supreme Court. The
16 Supreme Court found no error in that decision, and I
17 think it's consistent with other courts that have
18 allowed the issue of notice to come in to prove a
19 corporation's knowledge.

20 Now, they're of course relevant to punitive
21 damages and --

22 THE COURT: I want to hold that to one side,
23 though, for right now.

24 MR. DOWNEY: Sure.

25 THE COURT: Okay.

1 MR. DOWNEY: So my position is that they are
2 relevant. The prior surveys are relevant to notice
3 and potentially to negligence, although I will concede
4 that they are most relevant to punitive damages, and
5 there's no way I really can sort of get to the issue
6 of the extent of the recklessness without establishing
7 that they were aware that this is an issue.

8 THE COURT: Okay. Well, let's get to --
9 let's then get to that part of it. So, looking at
10 what you've got, what you've provided -- and I think I
11 have copies of the reports; right? You attached those
12 I think to your brief.

13 MR. DOWNEY: I did, Judge.

14 THE COURT: And then I've got -- let's see.
15 I had some notes on this, and I don't know where I put
16 them.

17 If we put your complaint and your
18 allegations of what you're claiming the acts and
19 omissions were -- and I'm just going to move some
20 documents around on my screens in front of me because
21 I had done this on paper, but I just want to work
22 through the documents that actually exist in the file.

23 When I compare those to the incidents that
24 you want to bring up, they seem rather dissimilar to
25 me. So, if the issue is -- looking at it from an

1 issue of notice, whether for negligence which, you
2 know, I'm a little not sure about, or for notice for
3 punitive damages purposes, the notice would have to
4 be -- particularly for punitive damages, it would be
5 one that would make them realize or likely that injury
6 was going to occur. So your negligence claim is which
7 count, 3?

8 MS. FLAGE: It's 1, Your Honor.

9 THE COURT: One. I must have just skipped
10 by it.

11 MS. FLAGE: And just for the record's sake,
12 I want to make sure we're looking at the First Amended
13 Complaint.

14 THE COURT: I think I am.

15 MS. FLAGE: Perfect.

16 THE COURT: I'm looking at the First Amended
17 Complaint, yes. Thanks. There are my notes.

18 And so you had various subparagraphs as I
19 recall that laid out all the different alleged
20 breaches, failure to report plaintiff's injury. I
21 think you had claimed -- paragraph 24 and paragraph 32
22 are primarily I think is what we're looking at.

23 So defendant's -- paragraph 24, Defendants
24 breached the standard of care by failing to follow
25 their own service plan, which required that Sara be

1 toileted and assisted with showering in the morning as
2 was her routine. Despite being aware of attempts to
3 self-bathe or toilet, defendant's staff failed to
4 update her written plan.

5 And then we have paragraph 32, which has the
6 various subparagraphs A through J alleging different
7 failures, failure to supervise, failure to answer
8 needs, failure to increase rounds, failure to use a
9 device to prevent access to running water, failure to
10 provide fall prevention, failure to evaluate and
11 document prior falls of the plaintiff, failure to
12 document injuries and circumstances, failure to send
13 hearing aid to the hospital, failure to follow
14 standards for assessment, documentation and reporting
15 and lack of sufficient staff.

16 Now, some of these for purposes of
17 negligence had to have occurred after she was
18 discovered in the bathroom; right?

19 MR. DOWNEY: No, no, no, no.

20 THE COURT: No?

21 MR. DOWNEY: Before. To the extent that I'm
22 showing notice that they needed to be aware, that the
23 corporation needed to be aware of an ongoing
24 institutional problem --

25 THE COURT: No. Your claims of negligence,

1 some of your claims of negligence like when she went
2 to the hospital and didn't have hearing aids, was that
3 when she went to the hospital after her injury?

4 MR. DOWNEY: Yes, sir.

5 THE COURT: How could that have caused an
6 injury?

7 MR. DOWNEY: It didn't cause the injury.
8 It's part of --

9 THE COURT: So why are we talking about
10 negligence that doesn't result in injury?

11 MR. DOWNEY: It's a little more complicated
12 than that, Judge.

13 THE COURT: It must be because I'm not
14 getting it.

15 MR. DOWNEY: When she goes to the hospital
16 under plaintiff's theory of the case, they don't pass
17 on the fact to the hospital that she has been
18 underwater for an undetermined period of time and has
19 evolving burns.

20 THE COURT: What does that got to do with
21 her hearing aid?

22 MR. DOWNEY: Because when she goes to the
23 hospital, she can't communicate at all because she
24 can't even hear anything in the one ear. It's a minor
25 issue in the scheme of things. But since you were

1 talking about the complaint, if I could focus Your
2 Honor on the central issue, which is their failure to
3 update the plan of care.

4 In other words, once they found out that
5 this woman was getting up in the evening and
6 attempting to shower and she couldn't shower because
7 she had one eardrum removed, under plaintiff's theory
8 of the case, this was a recurring problem with
9 neglect.

10 They weren't caring for her in the evening.
11 They weren't watching her, and after the family told
12 the facility multiple times that this behavior was
13 happening, they ignored it. They didn't update her
14 care plan, and ultimately, the burn injury occurred on
15 the 21st.

16 The prior surveys that I'm seeking to admit
17 deal with the failure to update and review care plans,
18 which like the Crouse case --

19 THE COURT: All right. Well, let's go
20 through them. Let's go through them. All right.
21 Because I'm looking at them here. All right. You've
22 got one -- I'm going to skip over the one from
23 February 22nd and 21 because I think that deals with
24 the incident we have right here. Right?

25 MS. FLAGE: That's correct.

1 THE COURT: So we're going to just hold that
2 to one side, and we're going to talk about the prior
3 ones.

4 So let me scroll down to that. That's your
5 Exhibit 3 I believe to your -- or no, it's not. Where
6 are those other reports?

7 MS. FLAGE: So, to our motion, we
8 attached --

9 THE COURT: Oh, they're on your motion?

10 MS. FLAGE: Yes.

11 THE COURT: I know I saw them.

12 MS. FLAGE: To our motion, we attached as
13 Exhibit 1 plaintiff's expert designation.

14 THE COURT: Okay. That's where I saw it.

15 MS. FLAGE: And it's Exhibit 3 to
16 plaintiff's expert designation -- or I'm sorry,
17 Exhibit 2 to plaintiff's expert designation.

18 THE COURT: I apologize. I know I saw it.
19 I just didn't remember where I saw it. Okay. I think
20 I have -- do I have that here?

21 MS. FLAGE: It was attached to
22 plaintiff's --

23 THE COURT: Plaintiff's expert designation.
24 Okay.

25 MS. FLAGE: Yes. It was attached to our

1 motion, and then, if you go to the back of plaintiff's
2 expert designation because it's fairly long, I believe
3 it's 56 pages --

4 THE COURT: Yes.

5 MS. FLAGE: -- so you're going to go beyond
6 56 pages, and you have Exhibit 1 which is the
7 February 2021, and then Exhibit 2 are the prior
8 surveys.

9 THE COURT: Okay. Thank you for clearing me
10 up on that.

11 MS. FLAGE: You're welcome. Thank you.

12 THE COURT: I know I saw it. Let me turn to
13 those because I want to go over them with you one at a
14 time.

15 So, looking at Exhibit 2 to the expert
16 designation, this is the 2017 incident.

17 MS. FLAGE: Yes, Your Honor. I believe I
18 show inspection date up at the top says 5/1/2017 --

19 THE COURT: That's what I have.

20 MS. FLAGE: -- 5/18/2017. Yes. That's the
21 first one I have as well.

22 THE COURT: So, looking at that, description
23 of violation, resident 1 was found to have bruises and
24 a hematoma on her face --

25 MR. DOWNEY: Judge, let me skip --

1 THE COURT: And that appears that some other
2 patient inflicted those.

3 MR. DOWNEY: Yeah, yeah, yeah.

4 THE COURT: What does that have to do
5 with --

6 MR. DOWNEY: I'm not interested in that
7 survey. I'm not interested in that. It's the one
8 that has to do with the based on a record review the
9 facility failed to ensure that individual service
10 plans are reviewed and updated.

11 THE COURT: All right. So let's look at the
12 evidence. The record for resident 1 was observed
13 during the inspection. The two most recent
14 individualized service plans in the resident's record
15 were dated April 25 of '17 and 11/30/15. Resident's
16 ISP dated 11/30/15 was more than a year old when the
17 resident was updated 4/25/17. So what?

18 MR. DOWNEY: It shows that they're not
19 updating the care plans.

20 THE COURT: But the evidence -- but for
21 purposes of punitive damages, you have to show that as
22 a result of this failure injury is likely to occur.
23 There's no injury here as a result of failing to
24 update the service plan, is there?

25 MR. DOWNEY: You're talking about for

1 resident number 1 in the May 2017 survey?

2 THE COURT: Yes. All it says is they didn't
3 update the service plan within a year. Clearly, okay,
4 let's accept that fact, but there's no -- as a result
5 of that, there was an injury.

6 So, for purposes of punitive damages where
7 the issue would have to be that they were on notice
8 that an injury was likely to occur as a result, that
9 doesn't do it, does it?

10 MR. DOWNEY: I would argue as the court
11 accepted the argument in Crouse that where the
12 facility is aware of a problem with respect to service
13 planning and they're not updating their service plans,
14 which is my exact allegation in this case, that they
15 have a duty institutionally to correct this issue. So
16 this is notice to the institution.

17 THE COURT: But what about that whole line
18 of cases that says negligence in the past can't be
19 used to show that there was negligence here. Is there
20 any dispute that they have a duty to do this?

21 MR. DOWNEY: That they had a duty to update
22 service plans?

23 THE COURT: Right.

24 MR. DOWNEY: The defendants dispute in this
25 case that they had a duty to update the service plan.

1 THE COURT: Is that disputed?

2 MS. FLAGE: It is disputed that they had to
3 update it at the time that plaintiff is suggesting but
4 not overall that there's --

5 THE COURT: This is within a year. Okay.

6 All right. Let's move on to the next one.

7 The next violation occurs in 2018?

8 MS. FLAGE: The next one I have, yes, is
9 November 28th, 29th and 30th of 2018.

10 THE COURT: Okay. So, looking at that,
11 evidence, resident number 7's most recent UAI -- what
12 does that acronym stand for?

13 MS. FLAGE: Uniform Assessment Instrument, I
14 believe.

15 THE COURT: Okay. Dated August 8th of '18
16 indicates oriented and needs mechanical and human help
17 while toileting, walking and wheeling, and most recent
18 ISP dated 8/9/18 indicates oriented to all spheres.
19 Resident uses a wheelchair and is propelled by staff.
20 It goes on from there.

21 What's the value of this?

22 MR. DOWNEY: What's the date of that survey,
23 Judge? I think you're reading the --

24 THE COURT: This is 11/28/18 inspection
25 date.

1 MR. DOWNEY: Again, that's the same issue
2 that they're not updating the plan to reflect the
3 resident's change in condition, and if you look at the
4 top of it, it says --

5 THE COURT: Yeah. But that's the
6 conclusion. I'm looking at what the facts are because
7 it's the facts that put them on notice for punitive
8 damages purposes whether injury was likely to occur.

9 MR. DOWNEY: Well, I would also argue that
10 as --

11 THE COURT: What we have here is, during
12 observation and interview, resident 7 was lying in
13 bed, requested toileting at 11:30, and PDA replied
14 that resident is toileted daily at 12 p.m. and staff
15 was not alerted to assist. So they're not responding
16 to a request to use the toilet; right?

17 MR. DOWNEY: Right.

18 THE COURT: That's the fact.

19 MR. DOWNEY: That is the fact.

20 THE COURT: Where is the injury? There is
21 no injury.

22 MR. DOWNEY: For this individual?

23 THE COURT: Yeah. So it's not relevant for
24 punitive damages calculation to put them on notice
25 that injury is likely to occur. Would you agree with

1 that?

2 MR. DOWNEY: No. Because if they're
3 neglecting the resident and they're ignoring the
4 resident's needs, the fact that the resident didn't
5 happen to fall on that one occasion doesn't change the
6 fact that this violation, the facility failed to
7 ensure the provision and service delivered shall be
8 resident centered to the maximum extent possible, that
9 exact same violation was cited in reference to
10 Ms. McCorkle's shower incident.

11 THE COURT: How does it put them on notice
12 to show conscious disregard and reckless indifference?

13 MR. DOWNEY: Because it's an ongoing pattern
14 and they're failing to meet --

15 THE COURT: If it doesn't result in
16 injury --

17 MR. DOWNEY: It doesn't have to. It doesn't
18 have to result in injury.

19 THE COURT: To put someone on notice,
20 wouldn't it -- if the idea of conscious disregard is
21 that the defendant would be aware that the conduct
22 probably would cause injury, wouldn't you have to show
23 injury --

24 MR. DOWNEY: No, Judge, because we're
25 talking prior --

1 THE COURT: -- from other events?

2 MR. DOWNEY: -- notice of similar regulatory
3 violations. So --

4 THE COURT: Without injury, without injury.

5 MR. DOWNEY: Without injury, without injury.

6 THE COURT: Wouldn't that put them on notice
7 that injury is likely to occur?

8 MR. DOWNEY: Yes, because it's a dangerous
9 situation that they have not remedied, and my
10 administrative expert --

11 THE COURT: I understand your position --

12 MR. DOWNEY: -- will say that based on this
13 citation, which was the exact same citation that was
14 given in McCorkle, that they failed to ensure resident
15 services delivered to the maximum extent possible
16 involving the failure to provide human help with
17 toileting, which was the exact allegation involving
18 McCorkle.

19 I don't have to prove that the first time
20 they neglected the resident the resident didn't happen
21 to be injured because they're on notice that the
22 residents are being neglected in a similar way to
23 which Ms. McCorkle was being neglected.

24 THE COURT: Okay. All right. I understand
25 your position on that.

1 Okay. So the next one that we have, then,
2 is at 2019.

3 MS. FLAGE: Yes. I have October 22nd, 2019
4 and October 23rd, 2019.

5 THE COURT: Doesn't this deal with
6 signatures on documentation?

7 MS. FLAGE: Yes, Your Honor. This one
8 relates to plans for medication. There are no issues
9 of medication management in this case.

10 THE COURT: I understand. I'm going to give
11 him the floor.

12 MS. FLAGE: Okay.

13 THE COURT: So, looking at the evidence here
14 that's presented, tell me what you're getting at with
15 this.

16 MR. DOWNEY: We're talking about the failure
17 to ensure that the resident --

18 THE COURT: The 2019 inspections. It's like
19 talking about not having required forms.

20 MR. DOWNEY: Yeah. Again, it's a defect
21 with the service plan that guides the resident's care.
22 It's telling them that it's not being reviewed the way
23 it should be reviewed, and they're not putting
24 information including who was involved in the plan.
25 It is a failure to document the plan properly, which

1 is the criticism of my expert in the McCorkle case.

2 THE COURT: So what I have is -- these seem
3 to be all documentation lapses.

4 MR. DOWNEY: For the 2019 survey, I would
5 agree with the exception of -- well, it's the next
6 survey that has to do with the reporting obligations.

7 THE COURT: Okay. One of your allegations
8 is that after Ms. McCorkle was injured they did not
9 timely report that.

10 MR. DOWNEY: Right. And that's --

11 THE COURT: Now, here's what I'm struggling
12 with on that: How does that contribute to any injury?
13 So let's assume it's a violation of some standards of
14 care, but it can't be linked to any injury, can it?

15 MR. DOWNEY: It can be linked to a failure
16 to follow up with proper care. And let me explain
17 what happened --

18 THE COURT: Do you make an allegation that
19 she suffered -- as a result of a failure to notify the
20 regulatory authorities, that contributed to her
21 injury?

22 MR. DOWNEY: No. What I've alleged in this
23 case is that the facility through multiple ways had
24 sought to conceal this injury. The first way they
25 sought to conceal it --

1 THE COURT: I'm not going to dispute you on
2 that. Let's say they did. The question is how did
3 that injure your client?

4 MR. DOWNEY: Because when they concealed the
5 injury, the concealment included not passing on
6 information about how she developed this to both the
7 Fairfax Hospital and to the surveyor. Yesterday, the
8 administrator --

9 THE COURT: Is there a claim here that says
10 somehow her treatment path was complicated or made
11 worse?

12 MR. DOWNEY: My experts address that issue
13 in their designation.

14 THE COURT: Is it in your complaint, though?
15 Your experts can address it, but I'm not sure I see
16 that theory in your complaint. Maybe I'm just --

17 MR. DOWNEY: I don't know whether I put that
18 information there but --

19 THE COURT: In reading your complaint is
20 that your client's injuries were sustained as of the
21 date of the incident, and she then had a medical
22 course, and she's got residual effects or whatever.

23 But I didn't get the impression that there
24 was one injury because, you know, what happens at the
25 home, and then somehow by withholding information that

1 the doctors then made her condition worse because they
2 didn't have full information.

3 MR. DOWNEY: It is alleged in the complaint
4 that they didn't pass on information to Fairfax
5 Hospital.

6 THE COURT: But how does that contribute to
7 her injury?

8 MR. DOWNEY: Because what happened was,
9 after this incident, the hospital calls up the
10 daughter and says were you exposed to a heat source.
11 The daughter at that point had no idea how long her
12 mother been under the shower with the water on her.
13 So she said not to my knowledge. The hospital ends
14 up -- and my expert addresses this -- not treating her
15 for a burn but for a rash.

16 THE COURT: How long was she in the hospital
17 for?

18 MR. DOWNEY: A few days.

19 THE COURT: And they've got between 7 and --
20 they have -- how many -- what's the reporting
21 requirement? It's somewhere around 7 days, wasn't it?

22 MR. DOWNEY: They have an initial reporting
23 requirement of 24 hours and then a subsequent
24 reporting requirement of 7 days.

25 THE COURT: And is there any connection

1 between reporting to DSS, which I think is the
2 authority they have to report to, and reporting to a
3 hospital?

4 MR. DOWNEY: Yes.

5 THE COURT: What?

6 MR. DOWNEY: Because yesterday in the
7 deposition, I was confronting the administrator about
8 why this wasn't reported as an unusual incident, and
9 her response was because we got no information from
10 the hospital indicating that this was a burn injury.
11 So they ship the plaintiff off to the Fairfax
12 Hospital --

13 THE COURT: No, that's not the question.
14 The question is, had they reported, would that
15 information have ever made it back to the hospital?
16 They're not reporting -- they're not obligated to
17 report it to the hospital.

18 You're saying they're obligated to report it
19 to DSS and that the failure to report to DSS somehow
20 complicated her course of treatment, but I don't see
21 how even had they reported it to DSS that would have
22 gotten back to the hospital.

23 MR. DOWNEY: The administrator explained
24 yesterday that the reason that this wasn't reported is
25 because they were under the misunderstanding -- she

1 didn't say misunderstanding -- that this had nothing
2 to do with the shower incident.

3 They had contacted the hospital and received
4 no information that she had suffered a burn injury and
5 were told that it was just a rash.

6 THE COURT: I'm asking about the other side
7 of that whole coin. Had they reported we found
8 Ms. McCorkle in the shower, we don't know how long she
9 was there, whatever they were supposed to report,
10 okay, how would that have changed her course of
11 treatment at the hospital?

12 MR. DOWNEY: I can't say it would, but what
13 I can say --

14 THE COURT: Then why is any of this
15 relevant?

16 MR. DOWNEY: Because their failure to report
17 the information to the hospital and the --

18 THE COURT: You're not raising -- in these
19 reports, you're not raising failure to report to the
20 hospital. You're raising the failure to report to the
21 regulatory commission.

22 MR. DOWNEY: I raise both in both my
23 designation and my complaint.

24 THE COURT: The evidence that you're
25 offering deals with reporting to DSS.

1 MR. DOWNEY: Correct.

2 THE COURT: That has nothing to do with
3 reporting to the hospital, does it?

4 MR. DOWNEY: I just explained the
5 connection.

6 THE COURT: It's a different agency. So had
7 they reported to the agency, there's no suggestion
8 that the hospital would have accessed those reports or
9 been given those reports.

10 MR. DOWNEY: I agree.

11 THE COURT: All right. I'm not convinced
12 that's relevant.

13 All right. What else do you want to say
14 about this?

15 MR. DOWNEY: Just that it's well established
16 by the Crouse case which went up to the Supreme Court
17 that these surveys are admissible. In the Crouse
18 case, it was enough that they had the same survey
19 involving bed alarms. Because obviously when you boil
20 down to every detail of a patient, you're never going
21 to find patients that are exactly alike.

22 My position on these surveys is we have the
23 surveyor designated. We have my experts who are going
24 to address -- and I'm talking about the prior surveys,
25 and in a contextual vacuum before we've established

1 all the facts in the case, I would argue that it's
2 error for the Court to exclude all this information
3 because it is clearly relevant to punitives, and I
4 understand the Court's position on negligence, but
5 excluding --

6 THE COURT: I'm having trouble. The thing
7 that I'm having the most trouble with is that it's
8 relevant to punitives. I don't think that's the easy
9 part of it. I think that's the most difficult part of
10 it for your position.

11 MR. DOWNEY: Well, that's what the court
12 ruled in Crouse, and it was a very -- exactly the same
13 issue that went up to the Supremes, and the Supreme
14 Court found no error in that lengthy decision, which
15 I've attached for Your Honor's review.

16 The Crouse court went on to say, "Far from
17 being irrelevant, the survey results were probative of
18 whether the defendant had notice and actual knowledge
19 of similar incidents of inadequate bed alarms. The
20 Court noted that notice of bed alarms were not being
21 used also put defendants on notice that the defect
22 could lead to falls." In other words, notice that
23 they're engaging in this --

24 THE COURT: Right, but -- okay. I'm going
25 to have to take a closer read on that. Okay. I

1 understand your position on it. Anything else?

2 MR. DOWNEY: Not on the prior surveys. I
3 have obviously arguments on the subsequents.

4 THE COURT: Then, as far as the 2021 survey,
5 what do you -- that can't be used for the notice
6 things, right, because that's after the fact?

7 MR. DOWNEY: Correct, Judge.

8 THE COURT: So what are you using that
9 document for?

10 MR. DOWNEY: I'm using that document to
11 establish, number 1, that the actual survey involved
12 Ms. McCorkle, and the basis for the survey involved
13 the very issues in this case that are relevant --

14 THE COURT: So what facts in that are you
15 seeking to admit that would be relevant here? Just as
16 far as what happened?

17 MR. DOWNEY: No. I'm seeking to have the
18 surveyor who I've identified as an expert speak to her
19 findings in reference to the survey because they
20 are --

21 THE COURT: Okay. So the facts, the facts
22 that -- you're talking about the facts, not opinion.

23 MR. DOWNEY: No. I'm talking about her
24 findings that they violated these regulatory
25 standards.

1 THE COURT: So that would be an opinion.

2 MR. DOWNEY: That would be an opinion.

3 THE COURT: And so her opinion would be,
4 based on the evidence that I've considered, and they
5 can go through everything, not necessarily reciting
6 the specific facts but the sources, I considered all
7 these documents, I talked to all these people, I, you
8 know, did whatever I did, it is my opinion that based
9 on those facts dealing with this incident the
10 defendants were in violation of state regulations. Is
11 that what you're getting at?

12 MR. DOWNEY: Yes. Where it says that --

13 THE COURT: Okay.

14 MR. DOWNEY: -- for example --

15 THE COURT: And what does the jury -- why is
16 that opinion helpful or necessary to your case?

17 MR. DOWNEY: There's a difference of views
18 in the room as to whether the surveys are relevant.
19 The defendant takes the position surveys are just
20 licensing. They have nothing to do with standards of
21 care.

22 My experts and their own staff -- in this
23 case, I've cited for you the testimony of the
24 administrator Don Wright -- said that these
25 regulations set standards for their facility.

1 THE COURT: I understand they set standards
2 for the facility. But to prove what the standard of
3 care is, you need expert testimony from somebody in
4 the field, don't you?

5 MR. DOWNEY: I have expert testimony from my
6 administrator, but the surveyor is also an expert
7 because she reviews and assesses --

8 THE COURT: She may be an expert on what the
9 regulations are. But I think wouldn't you need
10 somebody to say these regulations establish or
11 contribute to or something, have some relationship to
12 the standard of care?

13 MR. DOWNEY: I agree. That was established
14 through their own people's testimony.

15 THE COURT: I haven't heard any testimony
16 yet. So whose testimony?

17 MR. DOWNEY: Their administrative -- excuse
18 me, their care manager --

19 THE COURT: But this is your case in chief.

20 MR. DOWNEY: I understand that, Judge.

21 THE COURT: Okay. So, in your case in
22 chief, do you have an expert who is going to say or
23 can say that the regulations establish the standard of
24 care or contribute to establishment of the standard of
25 care?

1 MR. DOWNEY: Yes. My administrator expert
2 will say that the regulations that are cited in the
3 survey in combination with basic nursing practices
4 combine to set the standard of care.

5 She's an administrator and a nurse, and she
6 will opine consistent with the testimony of their own
7 staff members that these regulations, including the
8 ISP, the interdisciplinary plan, set the standard of
9 care.

10 One of the things that the surveyor found is
11 that they "failed to ensure that the comprehensive
12 plan included a description of identified needs based
13 upon the uniform assessment," and she goes on to
14 describe why the care plan was inadequate to deal with
15 the resident who then was injured in the shower.

16 So there's an identity of allegations
17 between what Zaykowski says, who is the surveyor, and
18 my experts. As I pointed out in the other cases that
19 were cited from around the country, it was that OSHA
20 case, Maladone -- excuse me, Masemer versus Delmarva,
21 a Delaware case holding that, in the context of a
22 wrongful death case, OSHA investigative reports were
23 not excluded based on lack of trustworthiness as it
24 was prepared by an independent government
25 investigator. That's who Ms. Zaykowski is in this

1 case.

2 THE COURT: She's an independent government
3 investigator. Who is she employed by?

4 MR. DOWNEY: Department of DSS.

5 THE COURT: All right. So she knows what
6 the regulations are, and she wants to offer an opinion
7 that this is in violation of the regulations.

8 MR. DOWNEY: Now, defendant --

9 THE COURT: Then the jury -- then the next
10 step the jury has to take is combining that with the
11 evidence from your standard of care expert who is
12 going to say the regulations make up the standard of
13 care; ergo, a violation of the regulations would be a
14 violation of the standard of care. That would be the
15 conclusion from the jury.

16 MR. DOWNEY: Correct.

17 THE COURT: Okay.

18 MR. DOWNEY: And the defendants don't move
19 to exclude her testimony. They move to exclude the
20 document, which in my view creates confusion for the
21 trial court.

22 THE COURT: No, I don't think so.

23 MR. DOWNEY: But how do you exclude the
24 document and not exclude the witness?

25 THE COURT: How do you exclude the document

1 and --

2 MR. DOWNEY: If you exclude the document,
3 the survey --

4 THE COURT: Well, the document has to be --
5 well, I don't have to tell you how to try your case.
6 One could conceivably present the expert without
7 introducing the document. It's conceivable.

8 Under McMunn versus Tatum, you know, you as
9 the plaintiff don't get to admit all the hearsay facts
10 on which your expert relied. If this document
11 contains those hearsay facts, you would have to have
12 an independent basis for its admission.

13 MR. DOWNEY: I absolutely agree, and I
14 outline those independent bases as a public document
15 and --

16 THE COURT: Okay. So we're here. I'm going
17 to have counsel address exactly what the thing is.

18 Let me go back to Crouse for a second,
19 though.

20 MR. DOWNEY: Sure.

21 THE COURT: Crouse was the case out of
22 Roanoke; right?

23 MS. FLAGE: Yes, Your Honor.

24 MR. DOWNEY: Yes.

25 THE COURT: I didn't have the subsequent

1 authority on this. Maybe you checked it out. Was
2 there? Did it go up to the Supreme Court for
3 decision?

4 MS. FLAGE: It was appealed. They did not
5 grant -- they found no error.

6 THE COURT: Did they just reject the
7 petition for appeal?

8 MS. FLAGE: Yes. Upon petition for
9 rehearing, so from the Circuit -- upon review of the
10 record in this case, in consideration of the arguments
11 submitted in support of, they find no reversible
12 error. The problem is if I may --

13 THE COURT: Yeah.

14 MS. FLAGE: With respect to Crouse, so I can
15 represent to Your Honor this client is also a client
16 of ours.

17 THE COURT: Which one? The Medical
18 Facilities of America?

19 MS. FLAGE: Correct.

20 THE COURT: So you're saying you're
21 intimately familiar with this case?

22 MS. FLAGE: Exactly. I did not try it, but
23 as you can imagine, it comes up frequently, and I am
24 familiar with it.

25 The problem we have here with the

1 information that's been submitted by plaintiff's
2 counsel is, one, we've got these decisions by -- or
3 these written decisions by the Supreme Court of
4 Virginia. There's no information here on what grounds
5 there was an appeal.

6 THE COURT: There is that.

7 MS. FLAGE: Number 2, the letter opinion
8 from Judge Dorsey that is included with plaintiff's
9 materials that talks about the surveys makes it very
10 clear that, number 1 -- number 1, we're talking about
11 apples and oranges. These are CMS surveys. We're
12 talking about DSS, but we can liken them if you wish.

13 THE COURT: CMS is the federal regulatory
14 agency just for the record.

15 MS. FLAGE: Exactly, yes. So the issues
16 that were decided by Judge Dorsey are related to
17 federal regulatory agencies, federal documents and
18 related to Medicare and Medicaid.

19 Also, the opinion makes it very clear that
20 the surveys themselves were not admitted into
21 evidence. Judicial notice was taken, but it doesn't
22 tell you what it was taken to say. What judicial
23 notice did Judge Dorsey take? It indicates in the
24 opinion that some information from the surveys was
25 judicially noted, but we don't know what.

1 So it's misleading for the plaintiff to
2 argue and rely upon Crouse in this case to say,
3 because of what Judge Dorsey did in Roanoke and
4 because of the judicial notice that was taken in 2013
5 in a case that's completely unrelated, we should do it
6 in this case.

7 I do also wish to point out, as I think Your
8 Honor has noted and maybe has recognized in review of
9 the materials, that that information was only
10 permitted to be presented to the jury in the punitive
11 damages stage.

12 In that case, the case was bifurcated. I
13 have a copy of the transcript from the hearing where
14 that decision was made if Your Honor is interested,
15 but the issues were bifurcated, and the issue of the
16 surveys was not permitted to even be brought up to the
17 jury or introduced, talked about, argued, anything
18 until the jury first determined whether or not they
19 were liable for negligence, and it went past the
20 compensatory stage and into the punitive stage.

21 So our position with respect to Crouse is
22 that it's a red herring, and it doesn't actually
23 provide the Court with guidance in this instance for
24 anything.

25 THE COURT: Okay. And was I correct in

1 understanding that the Supreme Court in opinions has
2 cautioned against using this type of evidence?

3 MS. FLAGE: No, you are not incorrect. We
4 rely on Stottlemeyer v. Ghramm with respect to
5 negligence cases leaving aside the punitive issue for
6 a second.

7 THE COURT: Yeah, yeah. Let's separate
8 those two out. I think you have to.

9 MS. FLAGE: Yes. So, with respect to the
10 negligence count, Your Honor is correct. Stottlemeyer
11 v. Ghramm is still controlling authority in the
12 Commonwealth. It is a Supreme Court of Virginia case.
13 Prior bad acts or complaints or violations or
14 negligence cannot be used to prove that we were
15 negligent on December 21st of 2020.

16 THE COURT: All right. So let's look at it
17 from just the punitive damages angle.

18 MS. FLAGE: Okay.

19 THE COURT: Why can't he use these things to
20 show -- you know, there have been all these other
21 instances in the past where they haven't updated
22 service plans. They're not responding to patients'
23 needs in a timely fashion.

24 Why can't they use those to show that they
25 should have known -- and frankly, they should have

1 known having been cited for those failures that this
2 is related to patient outcomes, and that failure to do
3 these things, they've been put on notice, hey, you
4 know, you're creating a risk here.

5 Isn't it enough to show that the defendants
6 understand that failure to do these things creates a
7 risk as opposed to actually creates injury?

8 MS. FLAGE: We would argue no. And here's
9 the reason why: These regulatory citations are
10 regulatory citations to the facility to say you have
11 to fix this or we think you're in violation, fix it,
12 or you lose your license. These are -- that's what
13 they're inspecting. It is not, hey, if you don't
14 follow these regulations, somebody might get hurt.

15 THE COURT: Well, is it reasonable to think
16 that the reason they have these things is to provide
17 patient safety and quality of care?

18 MS. FLAGE: I think you'd have to make that
19 assumption. There is nowhere in the regulations that
20 outlines that, that says the reason for these
21 regulations is to promote patient safety and keep
22 patients safe.

23 And in fact, the Supreme Court of Virginia
24 talks about -- this is a separate issue, but in
25 Cherrie versus I think it's Virginia Health Systems --

1 and I don't have the citation in front of me, but
2 residents had attempted to file lawsuits based on the
3 violation of these regulations, and the Supreme Court
4 of Virginia has said you can't have a cause of action
5 based on violations of these regulations.

6 These are administrative codes. They are
7 not for litigation in state courts. There is a
8 mechanism for remedy with relationship to violations
9 of these regulations, and you can't file a lawsuit
10 based on it.

11 So we would argue that that's not what these
12 regulations are for. They are for licensing. They
13 are for, if you continue to violate these, we will
14 pull your license, and that's all they're for. But
15 with respect to the notice issue --

16 THE COURT: Let me tweak this just a bit --

17 MS. FLAGE: Sure.

18 THE COURT: -- to get your reaction to this.

19 So suppose -- let's take the one where there
20 was this allegation that the gentleman had requested
21 toileting service at 11:30. At 12:00 it hasn't
22 happened yet.

23 MS. FLAGE: Right.

24 THE COURT: Suppose in that case -- and I
25 know that's not what happened, but suppose in that

1 case the gentleman then at that time at 12:00 gets out
2 of bed, tries to do it himself, ends up injured.

3 MS. FLAGE: Okay.

4 THE COURT: Wouldn't that incident be one
5 that could be used for punitive damages for purposes
6 of putting them on notice that an injury is likely to
7 occur if you don't respond to somebody's toileting
8 needs promptly?

9 MS. FLAGE: So the way I read this incident
10 report -- and I apologize, I can't put my hands on
11 exactly the date of that one that --

12 THE COURT: That one I think was the 2018.

13 MR. DOWNEY: 2018. Thank you. Yes, Your
14 Honor. Okay.

15 THE COURT: He was just in the bed, and they
16 just didn't move him, and nothing happened. There was
17 no injury to the patient.

18 But if there was injury to the patient, that
19 would be the kind of notice that would be pertinent
20 to, you know, if you don't attend to their needs
21 properly, injury is likely to occur because people
22 have to go.

23 MS. FLAGE: I would argue it would depend on
24 the circumstances behind the request for toileting.

25 So let's say for the sake of this

1 hypothetical for Your Honor's purpose that what it
2 says in this document is that resident number 7 pushes
3 the call bell to request assistance, and nobody
4 responds, and as a result, his needs for toileting
5 aren't met for the next 30 minutes.

6 If plaintiff's argument in this case is that
7 on December 21, 2020 Ms. McCorkle pressed her call
8 bell and nobody responded and as a result she got up
9 on her own, went and used the toilet and is injured --

10 THE COURT: We don't have evidence of that.
11 We don't have evidence that she requested service.

12 MS. FLAGE: That's correct, and there will
13 not be. It is not in the complaint --

14 THE COURT: She just got up and does it
15 herself apparently.

16 MS. FLAGE: Correct, yes, correct, which she
17 is permitted to do, but that's neither here nor there.
18 I mean we're talking about an assisted living facility
19 in this case. So the level of care --

20 THE COURT: I understand. I think you've
21 answered my question on that. So go ahead.

22 MS. FLAGE: I mean my position with notice
23 with respect to the punitive damages issue is that the
24 notice "of the defect" it's unclear what defect are we
25 talking about.

1 And Your Honor hit the nail on the head with
2 respect to let's look at the allegations in the
3 complaint. So what defect -- the punitive damages has
4 to be related to our breaches of the standard of care
5 in order to get punitives.

6 Plaintiff doesn't get punitive damages just
7 related to a whole slew of things that didn't cause
8 her injury because they're upset. It has to be
9 related to the injury that actually occurred. Right?
10 It has to be related to the negligence that's actually
11 being alleged.

12 So, in this case, the alleged negligence is
13 didn't have enough staff -- and Your Honor has
14 outlined it in paragraph 32, didn't have enough staff,
15 didn't properly update the individualized service plan
16 or the ISP. That's pretty much it. Didn't watch her.
17 I mean those are essentially -- that's a broad --

18 THE COURT: Well, they didn't prevent her
19 from using the water or having access to the water.

20 MS. FLAGE: Right. Well, but we know that
21 there's no -- we haven't talked about any surveys that
22 relate to showers. So we know that that defect
23 doesn't relate to these surveys or these inspections.

24 So those are the only two potential defects
25 that we're talking about, didn't have enough staff and

1 didn't properly update the individualized service
2 plan.

3 So, if those are the alleged defects that we
4 are supposed to be on notice of, these surveys don't
5 speak to that. I think that's kind of what Your Honor
6 was going through. These surveys don't speak to these
7 specific defects, number 1, a failure to update the
8 service plan such that somebody gets hurt; or failure
9 to have enough staff, that's not in these surveys at
10 all.

11 So our position is, even under plaintiff's
12 counsel's reliance on the products liability cases and
13 the car accident cases, these are not substantially
14 similar in ways that have been outlined by the Supreme
15 Court of Virginia or any other appellate court of
16 other states that plaintiff's counsel relies upon.

17 And so, even for the punitive damages stage,
18 we think -- our position is that these surveys are
19 inappropriate, inadmissible, but should not even be
20 discussed, waved around, talked about to say they've
21 been cited before, these things have happened before,
22 all that kind of --

23 THE COURT: Right. And then let's talk
24 about the post reports to this injury.

25 MS. FLAGE: Okay. One thing that --

1 THE COURT: I'm just curious as to what
2 specifically is the objection there?

3 MS. FLAGE: Certainly -- I mean, first and
4 foremost, obviously the hearsay issue, but I
5 understand that plaintiff's counsel may be entitled to
6 lay a foundation and do such things.

7 Our position would be, if that was
8 permitted, it would be improper to discuss anything
9 about it until that actually occurs, but it's not
10 relevant. The fact that --

11 THE COURT: Why would it not be relevant?
12 Well, there's two parts to this, isn't there? I
13 should get that report in front of me.

14 MS. FLAGE: Oh, yes. The actual survey and
15 then the plan of correction?

16 THE COURT: Well, no, no. I'm going to
17 treat the plan of correction completely separately.

18 But if there are facts in there and this
19 witness has a foundation for those facts, the witness
20 can testify to the facts, right, as to what happened?
21 Clearly.

22 MS. FLAGE: I don't think there's any --
23 there's no dispute about the facts as they exist. I
24 mean facts are facts. Anybody can testify about
25 facts.

1 THE COURT: The facts that are within their
2 personal knowledge.

3 MS. FLAGE: That are within their personal
4 knowledge. I will submit to Your Honor that there are
5 no facts within her personal knowledge in this
6 document.

7 THE COURT: Okay.

8 MS. FLAGE: But she does reference I
9 reviewed clinical notes and the clinical notes say X.
10 I mean our position is those clinical notes are coming
11 into evidence anyway.

12 THE COURT: So what's the objection, then?
13 You're just saying the document is not -- you're
14 saying it's not even relevant?

15 MS. FLAGE: Well, the fact that a year after
16 this incident -- so the inspection report is dated
17 that the inspection occurred on February 22nd of 2021,
18 but if you look in the body of it, it wasn't completed
19 for one year later. So this document that we're
20 looking at actually was prepared on January 21st of
21 2022.

22 THE COURT: Okay.

23 MS. FLAGE: And what the document does is it
24 outlines just as we've gone through with the other
25 prior surveys --

1 THE COURT: All these areas of
2 noncompliance.

3 MS. FLAGE: Correct. Those are opinions.
4 Those are not facts. So that is the surveyor's
5 opinion that, based on what I reviewed, I find that
6 this facility is in violation of certain regulations
7 and those are --

8 THE COURT: Okay. But that's an opinion
9 that they want to offer to show standard of care, that
10 this a violation.

11 MS. FLAGE: That some surveyor found a year
12 later.

13 THE COURT: If they have an expert that
14 says -- well, but doesn't that go to the weight?
15 Because they're talking about I think this incident,
16 though. Well, maybe they're not.

17 I mean I don't know what -- it's evidence,
18 for instance, on notification of regulatory agencies,
19 states, all unusual occurrences are to be reported. I
20 still don't see how any failure to report has anything
21 to do with this case or contributes in any way to the
22 injury.

23 MS. FLAGE: I agree.

24 THE COURT: Facility policy not numbered,
25 call bell system response, again, that seems -- if

1 there's no evidence that there was a request for
2 service here, that would seem completely irrelevant.

3 All right. Then the next one is -- this
4 talks about this incident.

5 MS. FLAGE: Correct. Are you looking on
6 page -- are you on page 2?

7 THE COURT: Yeah, I think so.

8 MS. FLAGE: Yes.

9 THE COURT: Lying on the floor, lying in the
10 shower on the floor.

11 MS. FLAGE: Yes. That relates to this
12 incident.

13 THE COURT: Right.

14 MS. FLAGE: That relates to the reporting.

15 THE COURT: But that goes to failing to
16 report.

17 MS. FLAGE: Correct.

18 THE COURT: Okay. The next one, based on
19 interview and documentation review --

20 MS. FLAGE: Same thing, failure to report.

21 THE COURT: Did not complete a report. And
22 resident 1 is our resident, right, is Ms. McCorkle?

23 MS. FLAGE: Yes, Your Honor. Yes.

24 THE COURT: So Wheeling has nothing to do
25 with this. It's not involved in this case.

1 MS. FLAGE: Wheeling?

2 THE COURT: Yeah.

3 MS. FLAGE: Correct.

4 THE COURT: Bathing and toileting, this
5 talks about a dispute between human help only physical
6 assistance versus a shower chair and a stool.

7 MS. FLAGE: That's right.

8 THE COURT: I'm not sure what that has to do
9 with this case. We're getting closer to the shower,
10 but really, the dispute here is that the records are
11 inconsistent, not that --

12 MS. FLAGE: In this violation?

13 THE COURT: Yeah.

14 MS. FLAGE: Right.

15 THE COURT: They're saying this is a
16 recordkeeping problem.

17 MS. FLAGE: Exactly.

18 THE COURT: It's not a service provision
19 problem.

20 MS. FLAGE: Correct.

21 THE COURT: The records don't match.

22 MS. FLAGE: Right.

23 THE COURT: The records didn't hurt her.

24 MS. FLAGE: Correct.

25 THE COURT: And then walking, again, this is

1 also a records keeping --

2 MS. FLAGE: Correct.

3 THE COURT: -- issue.

4 And then the next one deals with timing of
5 calls, but again, there's no evidence that there was a
6 call.

7 MS. FLAGE: Correct.

8 THE COURT: It was not a failure to respond
9 timely.

10 MS. FLAGE: Correct.

11 THE COURT: Now, supervision of residents, I
12 mean these facts might be admissible, wouldn't they?

13 MS. FLAGE: So the fact -- okay. When we
14 look at the evidence that's discussed in this
15 document, the clinical notes that are e-signed,
16 number 2, you know, yes. I mean it's not disputed
17 that the document says what it says.

18 The evidence that she was -- resident 1 was
19 found alone unsupervised on the resident's bathroom
20 shower floor, also not a fact in dispute.

21 Resident's UAI assist instrument dated a
22 month before shows that she's human help only physical
23 assistance, and then the individualized service plan
24 that we will provide hands-on care. So the allegation
25 here is that we failed to ensure that we provide

1 supervision of resident schedules.

2 So what I believe that plaintiff's counsel
3 wishes to bring before the jury is, based on the
4 evidence, the surveyor found that we were in failure
5 of ensuring --

6 THE COURT: Failed to ensure the facility
7 provides supervision of resident's schedules, care, et
8 cetera.

9 MS. FLAGE: Correct. So that is --

10 THE COURT: Okay. That gets closer to the
11 mark, doesn't it?

12 MS. FLAGE: It does. However, it's
13 misleading of the law in Virginia. We're not -- the
14 duty of a health care provider is not to ensure
15 safety. It is to comply with the standard of care.

16 THE COURT: But I'm not worried about your
17 perhaps responses to that. The question is, is it --
18 he's representing to me that he has evidence that says
19 DSS standards enlighten the standard of care, and he's
20 got an expert that says, in this case on these facts
21 pertinent to this case, that was a violation of the
22 standard of care, and that's squarely within the
23 alleged negligence that occurred.

24 You might have a defense to it at trial, but
25 why would it be inadmissible?

1 MS. FLAGE: I mean the document itself
2 obviously is hearsay, which we're not dealing with
3 today.

4 THE COURT: I'm going to assume they can lay
5 a foundation. Let's assume they can lay a foundation
6 for it. I mean they should be able to talk about
7 this, shouldn't they, at least that part?

8 MS. FLAGE: I mean our position is with
9 respect to violations of state regulations that deal
10 with licensing, to come in and tell the jury that we
11 violated -- that somebody found we violated a
12 regulation would be extremely prejudicial.

13 THE COURT: Right. Well, but if their
14 argument is it's not -- that doesn't mean you're
15 negligent, but those regulations inform the standard
16 of care.

17 He's got -- I have to accept his
18 representation at this point that he has that
19 evidence. I think that -- I think that's -- I don't
20 see how I can keep it out assuming there's a proper
21 evidentiary foundation for it.

22 MS. FLAGE: Well, so if -- and I don't know
23 if the Court is ruling right this moment.

24 THE COURT: I'm thinking about ruling that
25 way.

1 MS. FLAGE: But if the Court is going to
2 rule that way, we would ask strongly that no
3 references to state regulatory violations be brought
4 up until proper foundation is laid. Because once a
5 jury hears that a facility violated state regulations,
6 you can't unring that bell.

7 THE COURT: But the representation is he has
8 an expert who is going to say that and that the --

9 MS. FLAGE: Well, here's how I can see that
10 this potentially could come in. Let's break it down
11 that way. He's got the administrator expert who is
12 going to say I know what the standard of care is in
13 Virginia. The standard of care is informed by these
14 regulations, and my opinion is they breached the
15 standard of care, which is all that's relevant in a
16 medical negligence case. Right? So that's what
17 plaintiff's counsel potentially has.

18 Where does the survey and the surveyor's
19 result fall into that? It's either cumulative, or
20 that expert is going to say and the surveyor --

21 THE COURT: Is the surveyor the same person
22 who is going to be testifying at trial?

23 MR. DOWNEY: Yes. You're talking about --
24 Zaykowski did both the McCorkle survey and prior
25 surveys. So she has knowledge of both.

1 THE COURT: Is that your same expert who is
2 going to testify as to the administrative --

3 MR. DOWNEY: No. I have a separate expert
4 that's going to say these regulations set the standard
5 of care, they were violated, and then we have the
6 independent surveyor who --

7 THE COURT: Offers his opinion that it was
8 violated.

9 MR. DOWNEY: Who will give --

10 THE COURT: And that person is testifying
11 but not as an expert?

12 MR. DOWNEY: No. That person is testifying
13 as a surveyor expert because I had to designate her
14 opinions, which I did timely.

15 THE COURT: So this person who wrote this
16 report and says it was a violation you've designated
17 as an expert?

18 MR. DOWNEY: As an expert to give these
19 opinions.

20 MS. FLAGE: To say that it was a violation
21 but not that it was a violation of the standard of
22 care because she's not qualified to offer that
23 opinion.

24 THE COURT: I agree with you. But why can't
25 they -- why can't they -- if the expert on the

1 standard of care says it's informed by that, why can't
2 they do that to add credibility --

3 MR. DOWNEY: Bolster.

4 THE COURT: -- bolster their standard of
5 care expert?

6 MS. FLAGE: Well, I think that's the whole
7 point. You can't use it to bolster your standard of
8 care expert's opinion.

9 THE COURT: Why not?

10 MS. FLAGE: So if the standard --

11 THE COURT: They're not offering it as the
12 standard of care. It's a fact -- it's an expert
13 opinion. It's not a standard of care opinion that
14 helps the jury evaluate the standard of care opinion.

15 MR. DOWNEY: Judge, keep in mind that the --

16 THE COURT: Time out. They can't do that?

17 MS. FLAGE: I don't believe so because, if
18 it doesn't go to standard of care, then it's not
19 relevant. All that's relevant --

20 THE COURT: No. I'm going to disagree with
21 you on that.

22 MS. FLAGE: Okay. If I might speak about
23 the designation of the expert since that's brought up,
24 plaintiff's counsel did designate Ms. Zaykowski as an
25 expert to come -- and I may be pronouncing it wrong --

1 as an expert to come and talk about her opinions and
2 her designated opinions herein. We requested to take
3 her deposition, and plaintiff's counsel cannot produce
4 her.

5 MR. DOWNEY: I have no control over her
6 because she's an independent witness.

7 THE COURT: I don't think that's the issue
8 before me today.

9 MS. FLAGE: Understood.

10 THE COURT: So I'm going to stay in my lane.

11 MS. FLAGE: Okay.

12 THE COURT: All right. Next one, failure to
13 establish the policy to monitor each resident.

14 MS. FLAGE: Failure to establish a policy, I
15 think the Supreme Court of Virginia is clear that with
16 respect to internal policies and procedures in medical
17 negligence cases they're not relevant.

18 MR. DOWNEY: Yeah. And I can tell Your
19 Honor I don't care about that violation. I'm more
20 focused on the violations involving the care plan.

21 THE COURT: Listen, we're kind of over our
22 time here, and I think I just got to get to a ruling
23 on it, and here it is.

24 With regard to reports from 2017, 2018,
25 2019, I would exclude those in their entirety on

1 issues of liability and breach of standard of care. I
2 don't find Crouse to be persuasive in this regard, and
3 certainly, those couldn't come in in your case in
4 chief to prove those things.

5 Evaluating them from whether they're
6 relevant to the issue of punitive damages, I find that
7 they're not because they are not -- the allegations in
8 that I find are not of the type that would put the
9 defendants on notice of -- that an injury or any
10 awareness that their conduct or absence of conduct
11 would likely cause an injury because there's no
12 injuries here that are pertinent to the issues that
13 are raised in this case. So I don't think any of
14 those are admissible even for that purpose.

15 Turning to the 2021, we've just been through
16 that. There's only one part of this that I think is
17 relevant, and it's hard to identify which this is, but
18 this would have been standard number 22VAC40-73-460D
19 if that helps identify it where it's alleged that the
20 facility failed to ensure that the facility shall
21 provide supervision of residents' schedules. That
22 would be admissible, and I think the rest of it is not
23 provided that there's an otherwise sufficient
24 evidentiary foundation for it.

25 This survives relevance, and I think he

1 can -- because if he needs -- I don't think I need to
2 say anything more than that.

3 MS. FLAGE: I understand your ruling. The
4 only thing we didn't --

5 THE COURT: If you can put it into English
6 and on a piece of paper.

7 MS. FLAGE: I can and I brought a partial
8 order with me. So we'll do that.

9 The only thing that wasn't addressed and I'd
10 ask, then, that it be deferred is the issue of the
11 plan of correction that is associated with this
12 alleged violation.

13 THE COURT: Plan of correction, I'm not
14 going to reserve on that. I don't think the plans of
15 correction are admissible, period.

16 MR. DOWNEY: How do I not establish -- it's
17 admissible to establish both ratification. It's an
18 admission of their culpability and --

19 THE COURT: An admission of their
20 culpability, no, no. It's an admission that I'm going
21 to do whatever the licensing authority wants me to do
22 to keep my license.

23 MR. DOWNEY: But it's a contested --

24 THE COURT: And why is it -- I think it's
25 also a subsequent remedial act, not admissible. We're

1 moving on from there. Those are out.

2 MS. FLAGE: Thank you, Your Honor. I will
3 draft that. I'll step back, draft it, and we'll pass
4 it up.

5 THE COURT: I'll be here for the next hour
6 and a half.

7 MS. FLAGE: Thank you, Your Honor.

8 THE COURT: All right. Thank you, all. I
9 appreciate it.

10 (The hearing was concluded at 11:41 a.m.)

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CERTIFICATE OF REPORTER

I, Cheryl K. O'Donnell, Court Reporter,
hereby certify that I was authorized to and did report
in stenotype notes the foregoing proceedings, and that
thereafter my stenotype notes were reduced to
typewriting under my supervision.

I further certify that the transcript of
proceedings contains a true and correct transcript of
my stenotype notes taken therein to the best of my
ability and knowledge.

Cheryl K. O'Donnell

Cheryl K. O'Donnell