SAMPLE MOTION TO COMPEL

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Ruling: The Court's decision to this Motion is attached **here.**

VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

MIRIAM HIRSCH, by her next friend VICKI BETH HIRSCH	)	
Plaintiff,	)	
v.	)	**Case NO.: CL108222**
CCSP NOVA LLC et al	)	
Defendant.	)	

MOTION TO COMPEL
WITH SUPPORTING MEMORANDUM

COMES NOW Plaintiff, by counsel, and files this, his Motion to Compel and in support thereof, states as follows:

I. Background

1. This is a negligence case in which Plaintiff, Miriam Hirsch, suffered a hip fracture when she fell at Defendants' skilled nursing facility ("SNF") on March 1, 2016.

2. Plaintiff issued discovery with her complaint, sending courtesy copies to the defense counsel on June 21, 2017. On August 7, 2017 Defendant CCSP Nova LLC (CCSP) provided objections and responses to Plaintiff's interrogatories and document requests (Exh. Nos. 1 and 2).[1]

3. On August 9, 2017, Plaintiff sent Defendant a letter outlining various discovery deficiencies. (Exh. No. 3). On August 29, Defendant responded and provided some supplementation including emails exchanged between Plaintiff's daughter and the staff. *Id*. The parties continued to work together, but Defendant has ultimately refused to produce many of the core documents that Plaintiff needs to prove her case, including the event report for the fall, staff training in-services, personnel records, electronic records, policies and procedures and, *inter alia*, information on staffing.

4. After engaging in good faith efforts to resolve this matter, the Parties have been unable to resolve all their discovery disputes. Plaintiff seeks an order from this Court overruling numerous objections lodged in response to Plaintiff's discovery requests, as set forth below.

II. Argument

Miriam Hirsch was to Defendant's SNF with dementia, confusion, unstable gait and a history of falling from bed. Plaintiff alleges that Defendants breached their duty of care by failing to provide sufficient staffing to prevent the fall, attempting to conceal the actual circumstances surrounding the fall and then by failing to report it to their licensing authority.

[1] CCSP Nova LLC is the licensed operational entity. Plaintiff also served identical discovery on Defendant Commonwealth Care of Roanoke, ("Commonwealth") the management company. While Plaintiff will focus her Motion on discovery issued to CCSP, she will ask the Court to apply the rulings to both Defendants. Defendant Inova Health Systems was recently nonsuited from this case.

(Complaint, ¶¶ 23, 22). Prior to the fall Plaintiff had experienced multiple failures in Defendants' staff failing to respond to her calls for help. She alleges that on the evening in question, the staff had failed to respond to her call bells for toileting, which ultimately resulted in Plaintiff attempting to toilet herself when she fell and broke her hip.

Plaintiff issued discovery to explore staffing levels, staff training, facility protocols and prior instances of similar problems. Here, administrative issues involving inadequate staffing and staff training are intermingled with issues related to patient neglect in a skilled care nursing setting. Plaintiff had proposed a compromise to Defendants that was reached in another similar case, which included, *inter alia*, the limited production of personnel files and policies. (Exh. No. 4, email with prior discovery order, *Temes v. CSP Nova LLC*). Although this case involved the same Defendant and defense counsel, they were unwilling to pursue a compromise.

This Court has previously overruled Defendant's demurrer on punitive damages, which alleged that Defendants were on notice of prior similar problems involving staffing and deficiencies issued by the Department of Health. (Complaint, ¶ 20). Virginia law contemplates a liberal application of discovery rules in civil cases, allowing the discovery of any information that may lead to the discovery of relevant evidence.[2] Here, while Defendants have broadly asserted privilege objections, they have failed to substantiate their many objections. The party asserting privilege has the obligation to prove it.[3] A "mere assertion that the matter is

[2] Every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant. *Virginia Elec. and Power Co. v. Dungee,* 258 Va. 235, 260 (1999*See Va. Sup. Ct. Rule 4:1(b)(1); Benedict v. Community Hosp. of Roanoke Valley*, 10 Va. Cir. 430, 1988 WL 626030 (Va. Cir.) *citing Scope of Defendant's Duty of Pretrial Discovery in Medical Malpractice Action*, 15 A.L.R.3d 1446.

[3] *See E.I. Du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 415, 718 A.2d 1129, 1138 (1998) ("[t]he party seeking the protection of the privilege bears the burden of establishing its existence."); *See also Eppard v. Kelly*, 2003 WL 22014736 (Va. Cir.) ("The proponent of the privilege has the burden of establishing the existence of the attorney-client relationship, the privileged nature of the communications, and non-waiver of the privilege.") *citing United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982); *Commonwealth v. Edwards*, 235 Va. 499, 509, 370 S.E.2d 296, 301, 4 Va. Law Rep. 3003 (1988); *Virginia Electric & Power Co. v. Westmoreland-LG & E*

confidential and privileged will not suffice"[4] and the privilege must be construed narrowly.[5] Defendants' boilerplate objections should be overruled in their entirety, subject to reasonable limitations imposed by the Court through a protective order.

Partners, 259 Va. 319, 325, 526 S.E.2d 750, 755 (2000); *Anderson v. Anderson*, 29 Va. App. 673, 681-82, 514 S.E.2d 369, 374 (1999); *RML Corp. v. Assurance Co. of America*, 60 Va. Cir. 269, 274 (Norfolk 2002).

[4] *Robertson v. Commonwealth*, 181 Va. 420, 540 (1943).

[5] *See Pierce County, Wash. v. Guillen*, 537 U.S. 129 (2003) (stating that, "[w]e have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth."); *Baldrige v. Shapiro*, 455 U.S. 345 (1982) (stating, "[a] statute granting a privilege is to be strictly construed so as `to avoid a construction that would suppress otherwise competent evidence.'" quoting *St. Regis Paper Co.* v. *U.S.,* 368 U. S. 208, 218 (1961)). *See also*, *e.g., Univ. of Penn.* v. *EEOC,*, 493 U. S. 182, 189 (1990). *See generally U.S.* v. *Nixon*, 418 U. S. 683 (1974).

A. **Defendant Has Failed to Produce Documents That Are Directly Relevant to Plaintiff's Theories of Liability**

1. The Complete Record, Incident Reports, Electronic Records & 24-Hour Reports

Defendants objected to **Document Request No. 3**, seeking, *inter alia*, all records, electronic data reports, notes, videos, photos, orders or tests regarding Miriam Hirsch, asserting that the request was not reasonably calculated to lead to the discovery of admissible evidence. (Exh. No. 1). Under Virginia law nursing homes are required to complete an organized clinical record in accordance with professional standards and written policies and procedures. 12 VAC 5-371-360. That record "shall include" *inter alia*, "all symptoms and other indications of illness or injury, including the date, time and action take on each shift." 12 VAC 5-371-360(7).

Defendant did produce the written chart, but failed to produce other documents regarding Ms. Hirsch's care and the fall at issue. Similarly, in response to **Request No. 7,** Defendant objected to the producing recorded statements, commentaries, reports, notes, interviews or other communications relating to either Miriam Hirsch, any friend or Hirsch family member. Defendants later supplemented production with complaints filed by Ms. Hirsch's daughter,[6] but it is unknown whether this represents a complete production.

As Plaintiff's decedent is no longer capable of telling her version of events, it is critical that Plaintiff obtain any documents supporting her case.[7] While additional facts would likely be found in the investigative documents and electronic records, they have yet to be produced.

[6] At least one of those documents corroborated Plaintiff's observations that the staff was not properly responding to Ms. Hirsch's call bell and were further leaving her unattended while being toileted. To explore the true scope of this problem, Plaintiff seeks similar complaints for other residents and family, as relevant to notice.

[7] According to Plaintiff's daughter, after the fall her mother stated that she had rang the call bell, but the staff failed to respond. The staff did not document this fact in the record, but they did quote Ms. Hirsch as stating "I am trying to be a bad girl that[s] why I fall." (Exh. No. 5, 8:48 am, *late* chart entry for 3/1/16).

Defendants recently indicated that they will produce the "event report" subject to its inclusion in a protective order. Plaintiff opposes this condition.

a. <u>Incident or Event Reports and Other Investigative Documents are Not Subject to Privilege and Should be Produced Without a Protective Order</u>

Facts regarding patient care, or lack of care, are not privileged. There is no basis to support Defendants' failure to produce the incident report at issue. Defendants did not even raise a privilege objection in response to **Document Request No. 3 and 11**, seeking incident reports. Virginia law is clear that a Defendant cannot hide facts by burying them in reports or emails that are allegedly sent to the Quality Assurance Committee. *Riverside Hosp. v. Johnson,* 272 Va. 518, 532-533 (2006). In *Riverside* Plaintiff fell in the hospital. The staff completed a Quality Care Control report which Defendant argued was privileged because information in the report was used for the quality assurance committee and was generated for the purpose of improvement. Since the report was used for qualitative analysis to improve healthcare at Riverside, Defendant reasoned that the report was protected from disclosure by Va. Code § 8.01-581.17.

The Supreme Court disagreed. First, it noted that since the document was not generated by a peer review or other quality committee, as referred in the statute, they were not proceedings, minutes or reports of such a committee. While information from the report may have been provided to the quality assurance committee, the Court noted,

> A literal application of the phrase "all communications, both oral and written provided to the committees" would impress the privilege on every document and every statement made available to a committee or entity identified in the statute. **Such an application would allow a health care facility to immunize from disclosure every statement or document maintained by the facility simply by insuring that such statement or document was provided to or available to a peer review or quality review committee.** Considering this phrase in the context

> of the entire section, however, shows that the General Assembly did not intend such a broad application of the privilege.
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> * * *
>
> The obvious legislative intent [of the statute] is to promote open and frank discussions during the peer review process. . . . **It is the deliberative process and conclusions reached through that process that the General Assembly sought to protect**. . . . The use of this factual information in some way in the peer review or quality care committee process alone is insufficient to automatically cloak such information with the protection of non-disclosure.

Id. p. 523-33.(emphasis added).

Here, Defendants have not even asserted the quality assurance privilege, but if they had, such an objection would be without merit. Similarly, Defendants' insistence that the production of the incident report at issue now be covered under a protective order is equally without merit.[8] There is simply no basis for the Court to determine that good cause exists to include such a document within a protective order.

Defendants were also required to report this event to their licensing authority, which would have generated another report. They should be ordered to produce any and all reports involving the Plaintiff, including their licensing disclosures. If no such report exists, Defendants should be required to confirm such in supplemental answers.[9]

b. <u>Electronic Records & Audit Trail</u>

Defendants object to producing any electronic data that references Plaintiff on the grounds that such request is intrusive, beyond the scope of permissible discovery and irrelevant. (Ex. 1, Doc. Request Nos. 1 & 10). Defendants maintained an electronic chart during Plaintiff's

[8]Protective Orders "should be sparingly used and cautiously granted" with the moving party bearing the "heavy" burden to demonstrate good cause. *Baron Financial Corp. v. Natanzon*, 240 F.R.D. 200, 202 (D. MD. 2006), *citing Medlin v. Andrew,* 113 F.R.D. 650, 653 (M.D.N.C. 1987)(the burden of demonstrating good cause is a heavy one). *See also, U.S. Ex Rel Melan Davis v. Prince*, 753 F.Supp.2d 561 (E.D. Va 2010)(Magistrate's protective order violated Rule 26 (c) by delegating the good cause determination to the parties).

[9] If Defendant has filed a report with the Department of Health regarding the fall at issue, it would have been available under the Freedom of Information Act (FOIA). Plaintiff sought FOIA production for this facility and that production did not include any report on the fall at issue.

residence. By law, Defendants were required to maintain an audit trail, which includes data about when and who created the notes and whether there were alterations in the chart.

Defendants have no basis to object to the discovery of Plaintiff's electronic records. Under Virginia and federal law Defendants are required to produce such information.[10] Moreover, in *Riverside Hospital Inc. v. Johnson*, the Virginia Supreme Court held that healthcare providers had to provide all "factual information of patient care" not privileged, regardless of how it was kept or titled. 272 Va. 581, 636 S.E.2d 416, 424 (2006). Given the teachings of *Riverside* in context of an expanding use of electronic records, it would be nonsensical to allow healthcare providers to hide patient information in electronic records like they do when they create separate incident reports for "quality assurance."

Since computer data and electronic records can be transferred to a disc electronically, there is little burden in Defendants producing such information. In fact, Defendants do not even raise the issue of burden, but argue that the production is "intrusive." However, as the request is limited to electronic information about the Plaintiff, this argument is meritless and unsupported by any authority. *See Easton v. Sentara CarePlex Hospital*, CL 12-470 (Hampton Cir. 2014)(Holding audit trail and meta data are discoverable under Virginia law)(Exh. No. 10); *Peck v. Riverside Hospital*, CL 1400873V-04 (Newport News 2014)(Hospital to produce read-only electronic file of Patient's medical record in its computer system that supports and provides the

[10] Va. Code § 8.01-413(B) directs that "copies of hospital, nursing facility, physician's or other health care provider's records or papers shall be furnished." That includes "from computerized or other electronic storage." Va. Code § 8.01-413(A). Similarly, under federal law, a healthcare provider must "ensure the confidentiality, integrity and availability of a protected health information [it] creates, receives, maintains or transmits." 45 CFR § 164.306(a)(1). An "individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set." 45 C.F.R. 164.524(a)(1). If the protected health information that is the subject of a request for access is maintained in one or more designated record sets electronically and if the individual requests an electronic copy of such information, the **covered entity must provide** the individual with access to the protected **health information in the electronic form and format requested by the individual**. 45 C.F.R. § 164.524(c)(2)(ii)(emphasis added).

exact unmodified understandable substance of documentation for each activity, a/k/a audit trail, including all test edited and pages or documents that were inserted, replaced, deleted, merged or split)(Exh. No. 6);(*Cronin v. Sentara Healthcare* , Law No. CL 15000339 (Prince William Cir. Ct 2016)(Ordering hospital to run audit report where it has the ability to do so)(*Id*., Tr. at pp 9-13); *Smith v. Sentara Healthcare*, Law No. CL 15-8467 (Norfolk Cir. Ct. 2016)(Ordering audit trail as agreed to by Defendants, but requiring Plaintiff to incur costs of production). *Id*.

2. <u>Training Materials and Policies and Procedures are Discoverable.</u>

In support of Plaintiff's allegations regarding inadequate staffing and deficient training, Plaintiff is seeking limited personnel and training information for direct care staff, including training records and staff policies and procedures relative to fall prevention and other areas of care, including resident assessment and care planning. Prior to filing this Motion Plaintiff had proposed a compromise on these documents based on another case in which the same Defendant and defense counsel had agreed to produced limited personnel files, training information and policies and procedures under a protective order.[11] (Exh. No. 4).

Its not hard to understand why Defendants seek to avoid the discovery of clear, written standards. Only in a contextual vacuum could Defendants effectively argue that their conduct was reasonably prudent. But as a nursing home receiving federal funding, Defendants were obligated to follow federal regulations that set minimum standards of care for Defendants' facility, including standards for staffing. Guidelines embodying practice standards are nothing new in the industry.[12] As Defendants were required to provide staff with training[13] necessary to

[11] Consistent with the earlier compromise reached, Plaintiff has no objection to producing these documents under a protective order as long as it does not Plaintiff's yet to be produced incident report.
[12] Under federal law nursing homes "must develop and implement written policies and procedures that prohibit mistreatment, neglect and abuse of residents." 42 C.F.R. § 483.13 (c).

meet the needs of their patients, including high risk fall patients, this information should be fair game in discovery, if limited in time and scope. In *Cabiness v. Medical Facilities of America,* 80 Va. Cir. 425 (Danville 2010) the Court, in the context of a nursing home negligence case, found that Plaintiff's claims on inadequate staff supported Plaintiff's punitive damage claim.

Plaintiff seeks training materials provided to nurse aides and nurses who cared for Ms. Hirsch on the day she fell, limited to issues related to fall prevention, use of bed alarms, hygiene, resident feeding, weight loss, admission and discharge, resident toileting, charting, staffing and responsible party and physician notification. (Exh. No. 1, **Doc. Req. No. 65**). Defendant objected to this request as not likely to lead to the discovery of admissible evidence. Defendant also objected to the production of guidelines, rules, protocols and or policies involving the following: staff by-laws **(Req. No. 16)**, licensing authority standards **(Req. No. 17),** resident assessment, fall prevention and care planning **(Req. No. 18)**, nutrition, weight loss, eating assistance and hygiene **(Req. No. 19)**, charting and documentation **(Req. No. 20)** and use of bed rails, restraints, bedside commodes, bed alarms and floor mats, in effect during Plaintiff's resident. (Exh. No. 1). Defendants' only objection to these requests stated that "policies and procedures are not discoverable." *Id*. Defendants do not claim that these materials are irrelevant or subject to the quality assurance privilege, as they were not created by any peer review committee.

a. <u>Internal Policies and Guidelines Have Been Admitted into Evidence</u>

[13] See 42 C.F.R. § 483.75(e), requiring administration to provide nurse aide training and regular in-service staff training. Virginia law requires that "all resident care staff receive annual inservice training commensurate with their functions or job-specific responsibilities" to include, but not to limited to the following: infection control, emergency preparedness, safety and accident prevention, restraint usage, confidentiality, understanding needs of the aged and disabled, resident's rights, care of the cognitively impaired, basic principles of CPR and prevention of pressure sores. 12 VAC 5-371-260 A & B.

Like federal courts, the Virginia Supreme Court embraces a liberal test for admissibility of evidence. "Generally, a litigant is entitled to introduce all competent, material, and relevant evidence that tends to prove or disprove any material issue in the case, unless that evidence violates a specific rule of admissibility." *Barkley v. Wallace*, 267 Va. 369, 373 (2004)

While the defense bar routinely argues that such materials can never be admissible, they ignore Virginia Supreme Court cases that have allowed the admission or reference to such documents. *See Graves v. National Cellulose Corp,* 226 Va. 164 (1983) (allowing admission of defendant's application manual in negligence action alleging improper application of insulation); *Mackey v. Miller,* 221 Va. 715 (1981)(sanctioning admissibility of industry safety rules on issues related to the standard of care).

Policies and protocols are also admissible to show "notice." Over half a century ago, in *New Bayshore Corp. v. Lewis*, 193 Va. 400, 409 (1952), the Virginia Supreme Court allowed the defendant's safety rules and instructions admitted into evidence because they "indicate that defendant was aware of the potential dangers involved." More recently, the Virginia Supreme Court has reiterated that a defendant's departure from "instruction and training" was notice evidence of gross or willful and wanton negligence. *E.g., Green v. Ingram,* 269 Va. 281, 291, (2005); *Alfonso v. Robinson,* 257 Va. 540, 546 (1999).

Most recently, Defendants made successful use of internal procedures as a basis for arguing contributory negligence of a fork-lift truck operator. *Ronda Maddox Evans, Administrator v. NACCO Materials Handling Group,* Law No. CL 11-1427 (Roanoke City, 2016)(Exh. No. 8). The Court noted that Plaintiff's contributory negligence "was a collective series of actions which, . . . violated internal procedures and federal regulations and was plainly careless and contrary to his own safety." *Id.,* p. 7. If Defendants can use such materials

to establish contributory neligence, it seems only logical to allow Plaintiff's to use the same information to prove primary negligence? This is especially true where nursing homes, based on state and federal law, must be transparrent to residents in both creating and disclosing policies and procedures on patient care.

b. <u>Virginia Law Mandates Disclosure of their Policies to Residents or Their Designated Representatives</u>

Virginia regulations require nursing homes to develop numerous policies and procedures for the care and treatment of their residents.[14] 12 VAC 5-371-140.

Virginia law is also clear that such policies **must** be made available to the resident **or her designated representative upon request.**

12. VAC 5-371-140. Policies and Procedures (emphasis added)

*** * ***

G. **Policies shall be made** available for review upon request, **to residents and their designated representatives.**

H. Policies and procedures shall be readily available for staff at all times. (emphasis added).

Given that Plaintiff's counsel is now acting in the capacity of Ms. Hirsch's agent, there is no basis to refuse a litigation request for such policies, when Defendant would have been obligated to make them available to both Ms. Hirsch or their staff at any time. The fact that they are also readily available to the staff as an information reference is another reason to require their production, because they are relevant to staff training. This distinguishes these policies from the

[14] A SNF must have policies to address, *inter alia*, admission, transfer, discharge, physician services, dietary services, nursing services, activities, clinical records, resident's rights, restorative care and rehabilitation, clinical records, resident grievances, safety and emergency preparedness, professional ethics, truthfulness of communication with residents and preservation of resident dignity, with special attention to the needs of the aged, the cognitively impaired, and the dying. 12 VAC 5-371-140 (D).

types of guidelines that were addressed in Virginia's outdated cases of *Godsey-Pullen*.

c. The Facts and Purported Limitations of *Godsey-Pullen* Are Distinguishable And Inconsistent with Modern Rules of Evidence and Admissibility

Defendants typically rely upon *Pullen v. Nickens* to argue that internal guidelines cannot be used as a basis for imposing a negligence standard. 226 Va. 342 (1983). *Pullen* held that private rules were inapplicable where the evidence is being offered against one who is not a party to such rules. But here, Defendants are both parties to the case and to their own rules and guidelines. Patients are also intended third-party beneficiaries of such protocols. "Patients are also parties to these [rules] as members of the public represented by government agencies which require and enforce health care standards for 'the public welfare." Schockemoehl, *Admissibility of Written Standards as Evidence of the Standard of Care in Medical and Hospital Negligence Actions in Virginia*, 18 U. RICH. L. REV. 725, 753 (1984). In *Peck v. Riverside Hospital*, 2015 WL 3525083 (Newport News 2015), Judge Conway ordered Defendants to produce analogous JCAHO accreditation standards and requirements**.** (Ex. No. 8 p. 3). Other Courts have similarly allowed the use of such materials, even at trial. See, *Palm Springs General Hospital v. Valdes*, holding that the trial Court did not err in admitting expert testimony which relied upon JCAHO. 784 So2d 1151 (Fla. App. 2001), citing, *Carida v. Holy Cross Hosp. Inc.*, 472 So.2d 803 (Fla. 4th DCA 1983(JCAHO established the procedural requirements to be used by hospitals).

In *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167 (1915), a street car accident victim introduced the company's operation rules to set the standard of care owed to him. 117 Va. at 168-169. Similarly, in *Pullen*, a victim motorist introduced highway department maintenance guideline excerpts to set the standard of care. 226 Va. at 345-346, 350-351. Unlike the requirements in a medical malpractice case, neither case implicated expert testimony as Plaintiff

was seeking to establish standards of conduct without such foundational testimony. In *Godsey* there was "no evidence of any custom based upon [the particular private rules]." 117 Va. at 168. Judge Annunziata cogently observed in 1990 that healthcare PP&P "materials . . . may properly be seen as reflecting widely-adopted standards established or required by third-party entities, such as the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO")." *Curtis, supra,* 21 Va. Cir. at 279 (*citing* Schockemoehl, 18 U. RICH L. REV. at 730.) Therefore, she explained, "to the extent the hospital's policies and protocols are reflective of industry custom and even statewide practices, they may be distinguished from the purely private rules held inadmissible by the Supreme Court in *Pullen*." *Id*. (citing *Mackey v. Miller*, 221 Va. 715 (1981)). *Cf., X-IT Prods., L.L.C. v. Walter Kidde Portable Equip., Inc.*, 155 F. Supp.2d 577, 629 (E.D. Va. 2001)("guidelines . . . reflect business or industry practice").

d. <u>Nursing Home Protocols Are a Form of Admissible Habit Evidence</u>

When healthcare providers do not recall specifics in the care of a patient because they may have not documented the details, they often refer to their routine habit or custom. In 2000, the healthcare industry secured passage of Va. Code Ann. 8.01-397.1, providing for admissibility of habit or routine practice evidence in medical malpractice cases.

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye witnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice.

Va. Code Ann. 8.01-397.1(A).[15] "A 'habit' is a person's regular response to repeated specific

[15] This legislatively overruled *Ligon v. Southside Cardiology Assocs., P.C.*, 258 Va. 306 (1999). Indeed, healthcare interest routinely have lobbied the General Assembly for protectionist legislation when Virginia Supreme Court

situations. A '**routine practice' is a regular course of conduct of a group of persons or an organization** in response to repeated specific situations." Va. Code Ann. 8.01-397.1(B)(emphasis added). In September of 2011, the Virginia Supreme Court adopted the Virginia Rules of Evidence which are, in large part, modeled on the more liberal Federal Rules of Evidence. Va. Code Ann. 8.01-397.1 was specifically adopted by Rule 2:406.

Protocols followed by a facility are clear evidence of their custom and habit on particular care issues. They are at the very least discoverable where they relate to the central issues in a case, here fall risk assessment, fall prevention and resident discharge.[16] Defendants have a fall prevention policy that likely recognized the high risk associated with demented patients like Ms. Hirsch, who had a history of getting out of bed. Defendants also had a duty to train their staff on the proper assessment and response to high fall risk patients, which training likely embodies the same protocols that Defendants are refusing to produce.

e. <u>The Clear Majority of Circuit Courts Have Allowed Discovery of Policies</u>

While some circuit courts still resist the production policies and protocols, consistent with the liberal application of discovery rules and the adoption of more permissive rules of evidence, the clear trend has been to allow disclosure. Plaintiff attaches hereto a summary of some 92 cases which have required the production of policies and procedures. (Exh. 9, summary of Virginia decisions requiring production of policies and procedures). As the summary reflects, this Court ordered policies and procedures produced in *Christian v. Loudoun Hospital Ctr*., 2006 Va. Cir. Lexis 341, 2006 WL 8409476 (Loudoun 2006).

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decisions do not go their way. Another recent example is the amendment of Va. Code Ann. § 8.01-581.18 in 2006 to overrule legislatively *Oraee v. Breeding*, 270 Va. 488 (2005).

[16] Plaintiff contends that she attempted to obtain the discharge of her mother before March 1, 2016, but the facility refused. Plaintiff seeks to explore the extent to which this failure on the part of Defendants was motivated by policies or protocols which delayed discharge of Medicare patients receiving skilled rehab, because of the revenue opportunities that they present for third party billing.

In *Easton v Sentara Complex Hospital*, Judge Hutton, in discussing the split of authority in Virginia, noted that one of the most prolific Judge requiring the production of such materials was Justice Donald W. Lemons, when he sat as a Circuit Court Judge. He noted that the clear direction of these rulings was **"an inexorable march to more disclosure."** Law CL 12-740, WLW 014-8-05 (Hampton Cir. Ct. 2014)(emphasis added)(Exh. No. 10). While policies and procedures may not be admissible for purposes of determining the standard of care, numerous Virginia circuit courts have ordered their production in both nursing home and malpractice cases.

In *Johnson v. Roanoke Mem'l Hosp., Inc*, the Roanoke Circuit Court held that policies and procedures were relevant, discoverable and admissible "**since full and open discovery is the overwhelming order of the day** and since decisions of ultimate admissibility and relevancy are not yet ripe for rule, the fairer judgment at this stage of the proceedings as perceived by the court would be to allow the Plaintiff opportunity to explore the full potential of the documents at issue." 9 Va. Cir 196, 202 (Roanoke Cir. Ct. 1987)(emphasis added).

As explained in the malpractice case of *Curtis v. Fairfax Hosp. Sys., Inc.*, the discovery of such documents allows a more thorough examination of the Defendant, their staff and expert witnesses:

> [R]ules, regulations, and protocols can lead to discovery of admissible evidence on a myriad of issues . . . the **information will likely permit a more thorough and effective examination of the Defendant and their expert witnesses about the medical care provided to the plaintiff**, particularly in light of the applicable standard of care. 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 Defendant knew or should have known about claimant's condition and when they knew it.

21 Va. Cir. 275, 280 (Fairfax County Cir. Ct. 1990)(emphasis added).

3. <u>Personnel Files Should be Produced for Limited Staff</u>

Plaintiff seeks the personnel files for various categories of direct care staff, including staff who were responsible for monitoring decedent at the time of her fall and those that were involved in her care planning. **(Exh. No. 1, Req. Nos. 44 & 45)**. In a letter dated October 25, 2017, Defendants identified the names of those individuals who participated cared for Ms. Hirsch during her residency, but object to producing personnel files as seeking irrelevant, private and confidential information. Plaintiff has no objection to entering into a protective order to address Defendants' confidentiality and privacy concerns, which was a compromise this Defendant agreed to in another matter, as referenced above. (Exh. No. 4).

Personnel files contain a wealth of discoverable evidence, including, *inter alia*, position descriptions, employee evaluations, disciplinary information, orientation and complete in-service records for training.[17] Sometimes staff who feel they have been over-worked complain in their evaluations or other communications that the nursing home is understaffed. And if those complaints came from the evening shift, who allegedly ignored residents on their shift in while watching TV, they would corroborate Ms. Hirsch's written complaints.

Various jurisdictions, including Virginia, have required the production of personnel files in malpractice cases. *Musgove v. Medical Facilities of America,* Law No. CL 01-1431 (Danville Cir. Ct. 2005)(Exh. No. 11a); M*artin v. Host Marriot Corp.*, Law no. 99-194, (Charlottesville Cir. Ct. 2001)(Exh. No. 11c)(requiring production of in-service training and disciplinary actions of staff who cared for Plaintiff); *Miller v. Avante,* Law No. 10907, (Rockingham 1999)(Exh. No. 11c);*Smallwood v. Health Care Institute,* Law 2007 CA 0007517 (D.C. Superior Ct. 2008)(Defendant shall produce similar complaints from other residents)(Exh. No. 11d).

[17] Under Virginia law a nursing home personnel file must contain various documents, including, *inter alia*, the professional license, criminal record check, orientation, the facility's policies relating to the position, completed continuing education approved for the employee, annual performance evaluations and disciplinary actions taken. 12 VAC 5-371-140.

Defendant's objections to these requests should be overruled, subject to the limitations proposed by a protective order, requiring the redaction of all patient names, other than Ms. Hirsch.

4. <u>Production of Substantially Similar Complaints and Notice of Staffing Problems</u>

Notice may give rise to a duty to correct, especially in the context of nursing homes cases where staffing in an issue. Through **Document Request Nos. 47, 48 and 49,** Plaintiff has sought similar complaint information regarding, inter alia, falls, resident hygiene, resident admission or discharge, and inadequate staffing. Plaintiff also sought fall data that Defendant kept on patients from 2014 through March 2016, with patient names redacted. (**Doc. Req. No. 52)**. Defendant objected to these requests as over broad and irrelevant. Plaintiff also seeks information on census and patient acuity **(Doc Req. No. 53),** as this information is relevant to determine what Defendant's staffing levels should have been during the relevant time period.

The Virginia Supreme Court has approved the admission of substantially similar complaints in negligence cases.[18] In *Crouse v. Medical Facilities of America*, Judge Dorsey approved the admission of prior deficiencies regarding bed alarms[19] to support Plaintiff's verdict, noting that "survey results were probative of whether Defendants had notice and actual

[18] The Virginia Supreme Court has repeatedly held that evidence of prior complaints is both admissible and probative to prove either (a) notice or knowledge of the dangerous condition or defect; or (b) to raise an inference that such prior conduct will be repeated. *Ford Motor Co. v. Phelps*, 239 Va. 272 (1990); *WTAR Radio-TV Corp. v. City Council of City of Virginia Beach*, 216 Va. 892 (1976) (holding that "a previous course of conduct may raise an inference that such conduct will be repeated"). It is uncontroverted that prior similar incidents are admissible to establish notice of the defective or dangerous condition prior to the subject injury. For example, in *Ford*, the Virginia Supreme Court stated in unambiguous terms, "[E]vidence of similar accidents, when relevant, will be received to establish that defendant had notice and actual knowledge of a defective condition …. This rule, however, is limited to proof of notice and actual knowledge and does not authorize admission of the evidence substantively." 239 Va. at 276 (1990); *See also Jones v. Ford Motor Co*., 263 Va. 237, 239 (2002) (holding that it was reversible error for the trial court to exclude evidence of prior similar defects in a products case).

[19] In *Crouse* the admission of prior deficiencies involved deficiencies of other nursing homes within the defendant's chain. Here, Plaintiff seeks such information only for the nursing home at issue, which is arguably more probative than the prior complaints in *Crouse*.

knowledge of similar incidents of inadequate bed alarm use at other facilities.[20]" (Ex. No. 12). On appeal the Supreme Court upheld the *Crouse* verdict, noting "no reversible error in the judgment complained of." *Id.* Other Virginia Circuit Courts have ordered the discovery of such information.[21] Defendants clearly collect reporting information on falls for a variety of purposes, including Medicare. Since they are producing such materials to third parties, it could hardly be considered privileged. In the final analysis, Defendants have not established these materials are the by-product of any peer review committee, and as such, they must be compelled since they are potentially relevant. To deny their production would deprive Plaintiff of the opportunity to establish a foundation of relevance and admissibility and effectively limit proof in a case where the Plaintiff can no longer tell us the circumstances leading up to injuries.

As for Plaintiff requesting Facility Wide Incidence of Falls and Data, Defendant has not provided this information on request for facilities-wide incident and falls data **(Req. Nos. 15, 16 and 52**). Plaintiff is also seeking production of OSCAR and costs reports, which should contain the information that was sought in **Requests 27 (Medicare/Medicaid Costs) and Request No. 30 (OSCAR reports).**

5. <u>Production of Financial and Operational Documents</u>

Despite losing a demurrer on punitive damages, Defendants have failed to respond to Plaintiff's request seeking balance reports, 10ks (**Req. No. 56),** annual operating expenses (**Req.**

[20]Plaintiff fell out of bed twice before she fell on March 1, 2016, when she got out of bed because the staff had failed to respond to her call bell. Given her dementia and confusion, her daughter asked the nursing home use a bed alarm, as had be used in the hospital. The staff refused.

[21] In *Martin v. Host Marriott Corp.*, the Charlottesville Circuit Court compelled production of incident reports, ombudsman complaints and written patient complaints. Law No. 99-194 at 2 (Charlottesville Cir. Ct. 2001) (Ex No. 11b); *Temes v. CSP Nova LLC Law 2012 -14808* (Fairfax Cir. Ct. 2013)(Compelling prior complaints relative to staffing)(Exh. No. 4); *Miller v. Avante at Harrisonburg*, Law No. 10907 (Rockingham County Cir. Ct. 1999) (Ex. No. 11c) (compelling production of Document Request Nos. 15, 31 & 35, seeking incident reports relating problems with patient care, ombudsman reports and complaints about staff).

No. 57), financial statements and tax returns **(Req. No. 58).** (Exh. No. 1). Plaintiff has no objection to including these financial records within the coverage of a protective order.

While Defendants may like to cherry-pick their financials to hide their assets and income in related corporations, Plaintiff should be able to engage in discovery to explore the true extent of Defendants' net worth. *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, Plaintiff may present evidence of Defendant's wealth); *Wackernhut Applied Tech. Ctr., Inc. v. Sygnetron Prot. Sys. Inc.,* 979 F.2d 980, 986 (4th Cir. 1992). Moreover, in this case Plaintiff has alleged joint venture, which requires consideration of each entity's roll in the operation of the SNF. Along those lines, Plaintiff issued **Document Request No. 43** to flush out the true nature of the business relationship between Defendants.

B. **Defendant Should be Required to File Complete Interrogatory Answers**

Defendants' interrogatory answers suffer from many of the same deficiencies as their document responses. Defendants fail to provide contact information for staff listed in response to **Interrogatory No. 3.** (Exh. No. 2). Defendants object to providing all the information they know about the fall at issue, in responding to **Interrogatory No. 6,** including what Ms. Hirsch told them about why the fall occurred. *Id.* Defendant avoids answering **Interrogatory No. 8,** seeking to confirm the requests that Vick Hirsch made for her mother, which included a bed alarm. Defendants should be compelled to answer these questions without objections.

To the extent that Defendants' document production does not answer the question, Plaintiff seeks to confirm which guidelines or training on fall prevention was provided to Ms. Hirsch's direct care staff. However, Defendant objected to this **interrogatory (No. 11),** on the grounds that policies and procedures are not discoverable. (Exh. No. 2).

Defendants refuse to state what information is kept separate in their electronic charting and notes that "in addition to the chart, defendant Potomac Falls maintained, in electronic format, a privileged and confidential report to the incident. This document is not discoverable." (*Id*, p. 12). While Defendants now appear to be willing to produce the event report subject to a protective order, they have not revealed whether any additional patient care information is kept separate from the chart that they produced.

Through **Interrogatory No. 18,** Plaintiff seeks to find out whether there were any fall prevention interventions that were provided to Ms. Hirsch, that were not included in the chart. Defendant objects on relevance grounds. Plaintiff should not have to wait until trial to find out if Defendant provided care that was not documented.

Plaintiff also sought to determine the staffing levels in Defendant's nursing home, relative to the brief time period of February 18, 2016 through March 1, 2016. **(Interrogatory Nos. 19 & 20).** Staff levels are relevant to the claims in this case, as Plaintiff has alleged inadequate staffing. This information should be discoverable along with Defendant's staffing schedules, census and patient acuity.

Wherefore, these and other premises considered, Plaintiff moves this Court for an order overruling Defendants' discovery objections, as outlined above.

Respectfully submitted, Plaintiff, by counsel,

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CERTIFICATE OF SERVICE

I hereby affirm that on this 6th day of February 2018, a copy of this Motion to Compel, with Exhibits and Praecipe, was provided to defense counsel of record, by e-mailing and mailing a copy of this Motion regular mail, postage prepaid, to the following:

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_____
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