IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SELENA R. STETTS, as Administratrix of the Estate of GARY E. STETTS, Deceased, Plaintiff	:	No. 16-0983
vs.	:	Civil Action
	:	Professional Liability Action
MANOR CARE OF WILLIAMSPORT PA (NORTH), LLC d/b/a MANORCARE HEALTH SERVICES - WILLIAMSPORT NORTH; HCR MANORCARE, INC.; and HCR MANOR CARE SERVICES, LLC, Defendants	:	Defendants' Motion to Remand and Defendants' Motion for Partial Summary Judgment

OPINION AND ORDER

AND NOW, following argument on the parties' Motions in Limine, the Court hereby issues the following OPINION and ORDER.

BACKGROUND

Plaintiff commenced this action by filing a Writ of Summons on June 28, 2016, followed by a Complaint on February 16, 2018. Plaintiff alleges that Decedent, Gary E. Stetts ("Decedent") was a resident at Manor Care of Williamsport PA (North), LLC d/b/a ManorCare Health Services – Williamsport North (the "Facility"), operated by the corporate defendants,[1] from July 30, 2014 through August 25, 2014, and that while he was there he suffered injuries due to the Defendants' negligence, gross negligence, or recklessness.

[1] Plaintiff initially named thirteen corporate entities as defendants, but voluntarily withdrew its claims against eleven of them on August 10, 2021. The Court granted summary judgment in favor of one of the two remaining corporate defendants, HCR Manor Care Services, LLC, in its December 30, 2021 Order. Therefore, the only remaining corporate defendant is HCR ManorCare, Inc.

On December 30, 2021 the Court issued an Opinion and Order granting in part Defendants' Motion for Summary Judgment; a number of claims remain, and a jury trial is scheduled for August 8, 2022 through August 12, 2022 in Courtroom 2 of the Lycoming County Courthouse.

In anticipation of trial, Plaintiff filed six motions in limine and Defendants filed thirteen motions in limine. The Court heard argument on some of these motions on March 18, 2022, and the parties agreed to submit the remaining motions on briefs. The motions are ripe for adjudication.

PLAINTIFF'S MOTIONS IN LIMINE

A. Prejudicial Comments Concerning Plaintiff's Counsel

Plaintiff's first motion in limine seeks to preclude comments that Plaintiff's counsel and firm "are a 'greedy' and 'predatory' law firm that have 'waged war' on the nursing-home and personal care home industry." This motion also seeks to preclude references to Plaintiff's counsel "fil[ing] similar complaints and mak[ing] similar allegations in other cases." Plaintiff argues that such statements are irrelevant.

Defendants respond that they do not intend to make any comments not based on the evidence or "violat[e] rules of civility or professionalism," but contend that advertisements published by Plaintiff's law firm are "a relevant inquiry in *voir dire*." Defendants also assert that "[t]o the extent Plaintiff's Counsel's firm opens up legitimate areas of inquiry, for example, by undertaking misleading newspaper campaigns attacking individual nursing homes, or decided to repeatedly employ the

same under-qualified consultants in scores of cases, over many years, is a legitimate area of cross-examination."

At argument, Plaintiff's counsel indicated they have no objection to Defendant asking jurors at *voir dire* if they have seen any advertisements published by Plaintiff's firm or are otherwise aware of Plaintiff's firm. Plaintiff adamantly avers that the remainder of the issues raised by Defendant are simply irrelevant at trial.

The Court agrees that Plaintiff's firm's "newspaper campaigns" or history of nursing home litigation or advertisements is irrelevant to the issue of whether Decedent suffered injuries attributable to Defendants' negligence. The issue of whether and to what extent experts have testified previously in this field is relevant to that expert's qualifications, but suggestions that the actions of Plaintiff's firm in previous cases are somehow related to the merits of the instant case are irrelevant and will be excluded.[2] Therefore, the Court GRANTS Plaintiff's first motion in limine, except to the limited extent that 1) Defendant wishes to ask potential jurors at *voir dire* whether they are aware of Plaintiff's firm or have seen any advertisements published by Plaintiff's firm or 2) Defendant wishes to cross-examine Plaintiff's experts concerning their previous testimony in this field.

B. <u>Evidence Not Produced in Discovery</u>

Plaintiff's second motion in limine seeks to preclude any evidence not produced during discovery. Defendants respond that they are aware of no

[2] Throughout this Opinion and Order, all preclusion of evidence is subject to the caveat that a party may open the door to cross-examination on previously excluded issues if that party raises those issues themselves on direct examination.

undiscovered evidence that they intend to present at trial, though they wish to reserve the right to present such evidence in rebuttal to the extent Plaintiffs open the door and the admission is otherwise permitted by the Rules of Evidence. Therefore, the Court GRANTS Plaintiff's second motion in limine. If Defendants believe that a particular piece of undiscovered evidence is admissible, Defendants must receive permission from the Court before presenting such evidence at trial.

C. Testimony from Mr. Stetts's Family Regarding Mr. Stetts's Pre-Existing Medical Conditions

Plaintiff's third motion in limine seeks to preclude Defendants from "seek[ing] to elicit expert testimony from Mr. Stetts's family at trial regarding Mr. Stetts's pre-existing medical conditions." Specifically, Plaintiff wishes to preclude Defendant from asking Decedent's family for their *opinions* regarding any medical conditions from which he suffered, particularly any opinions regarding causation. Plaintiff does not dispute that Defendant may ask Plaintiff to testify to observed facts concerning Decedent's medical conditions, such as diagnoses.

Defendants do not contest this motion and aver they have no intention of attempting to solicit opinion testimony from Decedent's family members. Therefore, the Court GRANTS Plaintiff's third motion in limine.

D. Evidence, Testimony, and/or Argument that a Verdict for Plaintiff would Adversely Affect the Healthcare Industry and/or Referencing the Current COVID-19 Pandemic and the Effect it has had on the Healthcare Industry

Plaintiff's fourth motion in limine seeks to preclude "comment, suggest[ion], and/or argu[ment] at trial that a verdict for Plaintiff and against Defendant would

adversely affect the healthcare industry community, result in higher healthcare costs for patients in the future, and/or result in less availability of healthcare providers in the future." Plaintiff further wishes to preclude references to the COVID-19 pandemic's effect on the healthcare industry. These topics, Plaintiff argues, are irrelevant and prejudicial.

Defendants have indicated that they do not intend to bring these issues up, except potentially as legitimate cross-examination should a caregiver open the door with their testimony on direct. The parties further agree that Decedent died many years before the start of the COVID-19 pandemic and that the pandemic would have no relevance to his care, condition, injuries or damages. Therefore, the Court GRANTS Plaintiff's fourth motion in limine.

E. Evidence Relating to Selena Stetts's Prior Lawsuit

Plaintiff notes that Plaintiff Selena Stetts, Decedent's wife, "testified that she was a plaintiff in a workers' compensation lawsuit in 1999, which resolved via settlement." Plaintiff's fifth motion in limine seeks to preclude reference to this lawsuit as irrelevant and potentially prejudicial to the extent that it suggests Plaintiff, as a previous plaintiff in a lawsuit seeking compensation, is litigious. Defendants agree that Plaintiff's 1999 lawsuit is irrelevant to the issues in this case. Therefore, the Court GRANTS Plaintiff's fifth motion in limine.

F. Evidence, Testimony, and/or Argument that Selena Stetts Signed an Alleged or Otherwise Unenforceable Release when she did not have the Authority to do so

Plaintiff's sixth motion in limine sought to preclude reference to "an alleged release from liability" Defendants mentioned at Selena Stetts's deposition. At argument, Defendants agreed that under the law of the case this agreement does not bind Decedent or his Estate in any legal manner, but that they may intend to seek to admit the release for other reasons.[3] After discussion, upon Defendants' representation that they would not introduce the release for the purpose of arguing that it has a legal effect on the claims brought by Decedent's Estate, Plaintiff withdrew this motion in limine. Plaintiff may raise specific objections to the admission of the release at the time of trial.

DEFENDANTS' MOTIONS IN LIMINE

A. Testimony Regarding Understaffing, Undersupplying and/or Underbudgeting

Defendants' first motion in limine seeks "to preclude Plaintiff from offering any evidence, testimony or argument concerning general, unsupported, and/or unsubstantiated allegations of understaffing, undersupplying, and/or under-budgeting...." Defendants note that in the December 30, 2021 Order this Court granted their motion for summary judgment regarding Plaintiff's claim for corporate negligence due to understaffing. Thus, Defendant argues, this evidence is forbidden

[3] On March 8, 2019 the Court issued an Opinion and Order holding that an agreement to arbitrate signed by Selena Stetts was not binding on Decedent or his Estate, as she did not have authority to bind Decedent. The parties agree (or at least do not dispute) that the same conclusion applies to the release.

by the December 30, 2021 Order as well as irrelevant to the issues at hand and prejudicial.

Plaintiff responds first that the exclusion of this evidence would constitute reversible error for reasons similar to those raised in her January 11, 2022 Motion for Reconsideration of the Court's December 30, 2021 Opinion and Order. Plaintiff's response to Defendant's first motion in limine was filed while the Motion for Reconsideration was still pending; on March 18, 2022 this Court issued an Opinion and Order denying Plaintiff's Motion for Reconsideration and setting forth its reasoning. For the reasons stated in the March 18, 2022 Order, the Court disagrees with Plaintiff's first contention.

Plaintiff further contends that "evidence of understaffing is relevant and material to plaintiffs' corporate negligence claim and punitive damage request." Following the December 30, 2021 Order, the only remaining negligence claim is against Defendant HCR ManorCare Services, LLC for "failing to ensure that its policies relating to patient transfers and the use of [a Hoyer] lift were followed during the care of Mr. Stetts on August 1, 2014, either because the Facility's staff was not trained in the policy or because the staff was inadequately supervised." This incident is also the only surviving claim for punitive damages.

For the reasons discussed in this Court's December 30, 2021 and March 18, 2022 Orders, the Court GRANTS Defendant's first motion in limine, as testimony and evidence concerning "understaffing, undersupplying and/or underbudgeting" is not relevant to any issues remaining in the case. The Court recognizes that Plaintiff

disagrees with this conclusion, and notes that Plaintiff's objection to the grant of this motion in limine is preserved for purposes of appeal.

B. Hearsay Testimony of Gary Stetts

Defendants' second motion in limine seeks to preclude certain statements of Decedent. The record contains multiple references to statements Decedent allegedly made to his family members concerning events that occurred while the family members were not present and which they did not observe. Defendant also highlights testimony of Decedent's son, Mark Stetts, concerning things Plaintiff Selena Stetts, Marks' mother, told him but he did not observe. Defendant seeks to preclude both classes of statements.

Plaintiff indicates that she will not elicit testimony from Mark concerning statements Plaintiff made to him. With regard to statements made by Decedent, however, Plaintiff maintains that many of them are admissible under various exceptions to the general prohibition against hearsay. In particular, Plaintiff cites Pennsylvania Rules of Evidence 803(1)[4] and 803(3)[5] as applicable to many of these statements.

Although the parties have identified some statements and made preliminary argument about their admissibility, the Court cannot rule on the admissibility of any

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[4] Pa. R. Evid. 803(1), concerning "present sense impressions," provides that "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it" is not excluded by the rule against hearsay.

[5] Pa. R. Evid. 803(3), concerning "then-existing mental, emotional, or physical condition" provides that "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed" is not excluded by the rule against hearsay.

given statement of Decedent under an asserted exception to the rule against hearsay in an informed manner prior to trial. The admissibility of certain statements cannot be discerned from their text alone, but will depend both on the purpose for which Plaintiff offers them and the factual predicate established by the testimony and evidence to that point. Therefore, the Court DENIES Defendant's second motion in limine, without prejudice to renew this objection prior to or during the testimony of Plaintiff or Mark Stetts.

C. Plaintiff's Expert, Richard M. Dupee, M.D. Testimony Regarding Purported General Issues and Deficiencies in the Nursing Home Field

Defendants' third motion in limine seeks to preclude Plaintiff's Expert, Richard M. Dupee, M.D. ("Dr. Dupee") from offering testimony concerning deficiencies and problematic issues in the nursing home field generally as opposed to at the Defendant Facility. Defendant notes that at least one paragraph of Dr. Dupee's expert report discussed "the care provided in nursing facilities" generally and the problems reported by those who have contact with "the long-term care system...."

Plaintiff agrees that any evidence regarding problems at other care facilities or with the long-term care system generally is not relevant to whether and to what extent actionable issues occurred at the Defendant Facility while Decedent resided there. Therefore, the Court GRANTS Defendants' third motion in limine.

D. Department of Health Surveys

Defendants' fourth motion in limine seeks to preclude evidence or testimony concerning Department of Health ("DOH") surveys. In her pretrial statement, Plaintiff

identified DOH surveys from 2013 to 2015 as potential exhibits. Defendants contend that among Plaintiff's experts, only Noreen Brzozowski, MSN, RN ("Nurse Brzozowski") mentioned DOH surveys, noting that they demonstrated the Defendant Facility had a history of non-compliance with certain regulations in the years immediately preceding Decedent's residence there. Defendants argue, however, that Plaintiff does not "describe in any coherent, cogent way how any of these deficiencies" noted in the surveys "have any relevance to Mr. Stetts," especially in light of the fact that no DOH surveys were conducted during the twenty-seven days that Decedent was a resident at the facility. Defendants also argue that the DOH surveys are hearsay.

Plaintiff responds that Decedent's injuries "were not simply the result of mere medical, professional negligence, but were instead the product of systemic care-related deficiencies at the Facility." Thus, Plaintiff argues, the DOH surveys are relevant to claims of corporate negligence and punitive damages, inasmuch as they "demonstrate[] the existence of across-the-broad substandard care rendered at the nursing home and [are] relevant to show that [defendants] [have] knowledge of these deficiencies in patient care...."[6] Plaintiff further argues that the surveys are not hearsay, inasmuch as they will be introduced not for the truth of the matter asserted but to establish that Defendants had notice of complaints about alleged issues.

[6] Plaintiff quotes *Scampone v. Grane Healthcare Company*, 169 A.3d 600, 626-27 (Pa. Super. 2017).

On one hand, a DOH survey from shortly before Decedent was a resident at the Defendant Facility that noted a failure to develop, enforce, or train its employees in Hoyer lift and patient transfer policies and procedures would directly suggest that Defendants had notice of this shortcoming and would be highly relevant to the issues of notice and knowledge. Even a DOH survey that indicated multiple failures to develop, enforce, or train its employees in other required policies could constitute notice to Defendants that their policies and procedures, as a whole, were in need of attention. Conversely, a DOH survey that addresses alleged issues unrelated to the development, enforcement, or training in specific policies and procedures would not be relevant and would merely cast Defendants in a bad light.

Therefore, the Court finds that the DOH surveys are relevant to the issues of notice and knowledge, and thus punitive damages, but only to the extent that the portions Plaintiff seeks to admit relate to failure to develop or enforce adequate policies and training.

The Court further concludes that the DOH surveys are not hearsay if entered for the purpose of demonstrating that Defendants had notice or knowledge of *complaints* at the Defendant Facility or *direction* regarding whether and how to improve or rectify issues identified in the surveys.

For these reasons, the Court GRANTS IN PART and DENIES IN PART Defendant's fourth motion in limine. Plaintiff may present portions of DOH surveys only to the extent that they relate to failure to develop, enforce, or train staff regarding appropriate policies and procedures.

E. Center for Medicare Services Expected Staffing Data

Defendants argue that to the extent the grant of summary judgment on the understaffing claim precludes the admission of evidence of understaffing at the Defendant Facility, Plaintiff should be precluded from admitting the Center for Medicare Services ("CMS") "expected staffing data" into evidence. Alternatively, Defendants note that CMS compiles data on daily staffing "to assist consumers when selecting a skilled nursing facility," but "has stated that this data cannot be used to indicate noncompliance with other requirements for [long-term care] facilities" and "admits that the staffing levels they report may not be a full representation of the hours staff actually worked."

Plaintiff's response to Defendants' Motion rests largely on grounds contained in their Motion for Reconsideration of the grant of summary judgment on the issue of understaffing and their response to Defendant's first motion in limine to preclude the introduction of testimony and evidence related to understaffing generally. For the reasons discussed in the December 30, 2021 Order, the March 18, 2022 Order, and above, the Court GRANTS Defendants' fifth motion in limine.

F. Dr. Dupee's Qualifications

Defendants' sixth motion in limine seeks to preclude the testimony of Dr. Dupee on the grounds that his qualifications do not satisfy the requirements of the MCARE Act.[7] The MCARE Act contains the following provisions concerning expert qualifications to testify to standard of care:

[7] 40 P.S. § 1303.101 *et sub.*

> "[A]n expert testifying as to a physician's standard of care... must meet the following qualifications:
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> > (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
> >
> > (2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue..."[8]

Defendants argue that "Dr. Dupee is mostly a medical doctor that works as a professor," and note that he "holds no certification, license, or any relevant background or specialized training in the realm of working in skilled nursing facilities."

Plaintiff first notes that by its own terms, this provision applies to "actions against a physician"; as this case does not involve an action against a physician, Plaintiff argues, Dr. Dupee is not required to satisfy the above standard.[9] Additionally, Plaintiffs note that Dr. Dupee indicates he is "an experienced and board-certified internist and geriatrician, providing direct care to patients in outpatient, hospital, nursing home, and assisted-living settings"; serves on the editorial advisory board of *Annals of Long Term Care*, and has published scholarly articles regarding the quality of care in nursing homes. Thus, Plaintiffs argue, his substantial experience as a geriatrician renders him a practitioner "in a subspecialty which has a substantially similar standard of care for the specific care at issue," and thus able to satisfy whatever requirements are imposed by the MCARE Act.

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[8] 40 P.S. § 1303.512(c).

[9] Plaintiff cites *Freed v. Geisinger Med. Ctr.*, 971 A.2d 1202, 1212 (Pa. 2009) and *Ciechoski ex rel. Proffit v. Cadieux*, 2015 WL 6950021 (Pa. Super. 2015) (non-precedential) as supporting this contention.

The Court agrees with Plaintiff that Dr. Dupee's qualifications satisfy the MCARE Act regardless of whether the particular provisions of § 512(c) apply (which, for reasons noted by Plaintiff, is dubious at best). Therefore, the Court DENIES Defendants' sixth motion in limine.

G. Fraud, Abuse, Neglect, Recklessness and Oppressive Behavior

Defendants' seventh motion in limine seeks to preclude Plaintiff from using the terms "fraud," "abuse," "neglect," "recklessness," and/or "oppressive behavior." Defendants contend that these terms are "highly inflammatory," and that the attendant prejudice outweighs any probative value of using these terms.

Plaintiff responds that the use of these terms is not only natural – inasmuch as they are exactly what Plaintiff is alleging occurred – but in accordance with state and federal regulations that use these terms when discussing the operation of nursing homes.

This Court's December 30, 2021 Motion concluded, *inter alia*, that Dr. Dupee's expert report could support a finding of recklessness, and that Plaintiff had stated a viable claim for negligence per se arising out of a violation of 18 Pa. C.S. § 2713, "Neglect of Care-Dependent Person." The Court concludes that the terms "neglect" and "recklessness" are the most accurate descriptors of Plaintiff's allegations, and are not more prejudicial than probative.

Conversely, there is no allegation of fraud. Although Plaintiff's claim for breach of fiduciary duty survives, that claim is premised on the claim that Decedent's poor health meant he "requir[ed] such comprehensive care as to render him

essentially helpless," and that Defendants assumed the responsibility to provide this care but failed to do so. The Court is unsure that the phrase "oppressive behavior" means in the context of the claims presented in this case. And, finally, the Court finds that the use of the term "abuse" in the context of the claims presented in this case would be inflammatory and mislead the jury.[10]

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendants' seventh motion in limine. Plaintiff is precluded from using the terms "fraud," "abuse," and "oppressive behavior" at trial. Plaintiff may use the terms "neglect" and "recklessness."

H. Evidence/Testimony Concerning CMS/Medicare/Medicaid and/or Governmental Programs/Reimbursement

Defendants' eighth motion in limine seeks to preclude evidence and testimony concerning reimbursement from CMS, Medicare, Medicaid, or any other governmental reimbursement program as "irrelevant" and "unfairly influen[tial] [upon] the fact-finder." Defendants contend generally that Plaintiff cannot show any relevance of such testimony to the issues presented.

Plaintiff first argues that Defendants' motion is overbroad and nonspecific, and should be denied for that reason. Plaintiff further contends that such evidence may be relevant to whether "Defendants allocated their resources appropriately or

[10] Whereas the Court denied Defendants' motion for summary judgment on the negligence per se claim arising out of 18 Pa. C.S. § 2713, which incorporates a recklessness standard, the Court granted Defendant's motion concerning the Older Adults Protective Services Act, which discusses "abuse." Therefore, there is no corresponding need for Plaintiff to reference "abuse" to satisfy a legal standard.

whether Defendants allocated their resources in a negligent, or even reckless, fashion," which in turn is "highly probative of Plaintiff's corporate negligence claim."

The Court finds that Defendants' concern that evidence concerning governmental reimbursement programs could unfairly influence the jury is justified, and that Plaintiffs' theory of how that evidence is relevant to the issues in the case is speculative at best. Therefore, the Court GRANTS Defendants' eighth motion in limine, as evidence and testimony concerning CMS, Medicare, Medicaid, or other governmental program reimbursement is irrelevant to the issues in this case, which are confined to harms against Decedent and a sole claim for corporate negligence and punitive damages relating to a failure to develop, enforce, or train its employees in a policy governing the use of a Hoyer lift.

I. Transcripts and Videos of Sue Morey, Kathryn Hoops, and Matt Mayo

Defendants' ninth motion in limine seeks to preclude the introduction of transcripts and videos of Sue Morey, Kathryn S. Hoops, and Matt Mayo, which were identified by Plaintiff as possible exhibits. Defendants note that the depositions and videos of these persons were taken *not* in this case but in various other cases between 2010 and 2021. Defendants argue that these deposition transcripts and videos are irrelevant to the case at hand, and also find problematic Plaintiff's indication that their potential exhibits "includ[e] but [are] not limited to" those listed in their pretrial statement.

Plaintiff responds that these exhibits may be admitted in two ways: first, "for impeachment and/or refreshing recollection purposes if the witnesses testify at the

time of trial," and second, "as former testimony in the event that the witnesses do not appear and testify live at the time of trial pursuant to Pa. R.C.P. 4020."

Pennsylvania Rule of Evidence 612 allows "[a] witness [to] use a writing or other item to refresh memory for the purpose of testifying while testifying, or before testifying." Under the plain language of this rule, either party may use any "writing or other item," without limitation, to refresh a witness's recollection. If one party uses a writing or item to refresh the witness's recollection, the other party may "inspect it… cross-examine the witness about it, and… introduce in evidence any portion [of the writing or item] that relates to the witness's testimony."

Pennsylvania Rule of Civil Procedure 4020, governing "use of depositions at trial," states, in relevant part:

> "(a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition, in accordance with any one of the following provisions:
>
> …
>
> (2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a party or a person designated under Rule 4004(a)(2) or 4007.1(e) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose."

The admission of deposition testimony under Rule 4020 in a subsequent action, however, "is limited to those instances where there is such identity or privity of parties and subject matter that the second action is deemed the same as the first."[11]

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[11] *Ryan v. Kirk*, 180 A.2d 55, 57 (Pa. 1962).

Generally, "[t]estimony given in one action is not admissible in another action unless there is an identity of issues and an identity of parties...."[12]

Ultimately, under Rule of Evidence 612, Plaintiff may use the deposition transcripts to refresh the recollection of witnesses, and it will be Defendants' prerogative to move for the admission of some or all of these transcripts if so used. Plaintiff has not demonstrated, however, identity of parties or issues between the instant case and the cases in which the depositions were taken. Therefore, the Court GRANTS IN PART and DENIES IN PART Defendants' ninth motion in limine. Plaintiff may utilize the depositions to refresh witnesses' recollections, but may not admit them substantively pursuant to Rule of Civil Procedure 4020.

J. Trifurcation of Trial

Defendant's tenth motion in limine seeks the trifurcation of trial into three phases: professional negligence, corporate negligence, and punitive damages. Defendant notes that the decision to bifurcate (or, presumably, trifurcate) trial is within the Court's discretion, and asserts that trifurcation here will promote judicial economy while protecting Defendants' right to be free of "taint of the jury through sympathy occasioned by knowledge of the severity of the injury."

Plaintiff responds that her "claims of medical professional negligence and corporate negligence [are] too interwoven to be separated into different trial phases," though Plaintiff does not object to *bifurcation* into a first trial addressing liability and compensatory damages and a second phase addressing punitive damages. Plaintiff

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[12] *First Pennsylvania Banking & Trust Co. v. McNally*, 188 A.2d 851, 852 (Pa. Super. 1963).

contends, though, that even if this Court does bifurcate the trial, she "must be permitted to introduce evidence of Defendants' intentional, willful, and/or reckless conduct in the first phase of trial… because separating evidence of Defendants' negligence from Defendants' intentional, willful, and/or reckless conduct will be repetitive, duplicative, and entirely unworkable."

Although no single Rule of Civil Procedure addresses the process of bifurcation, Rules 213(b) and 224 allow courts to bifurcate (or trifurcate) proceedings.[13] Rule 213(b) states:

> "The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues."

Rule 224 states:

> "The court may compel the plaintiff in any action to produce all evidence upon the question of the defendant's liability before calling any witness to testify solely to the extent of the injury or damages. The defendant's attorney may then move for a non-suit. If the motion is refused, the trial shall proceed. The court may, however, allow witnesses to be called out of order if the court deems it wise to do so."

The decision to bifurcate or trifurcate a trial is within the sound discretion of the trial court, and "will not be disturbed absent an abuse of discretion."[14]

Here, the Court agrees with Plaintiff that the claims of professional negligence and corporate negligence are interwoven, and that splitting these two phases of trial

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[13] *See, e.g., Ptak v. Masontown Men's Softball League*, 607 A.2d 297, 299-300 (Pa. Super. 1992).
[14] *Id.* at 299.

would be duplicative. Given the nature of the claims and Decedent's relatively short time at the Defendant Facility, the Court does not believe that the issues presented here are likely to confuse or prejudice the jury if presented together.

Additionally, the Court agrees with Plaintiff that she must be permitted to present evidence of Defendants' alleged intentional, willful or reckless conduct at the liability phase of the trial. At least one surviving claim – negligence *per se* for a violation of 18 Pa. C.S. § 2713 – *requires* proof or intentional, knowing, or reckless conduct. Thus, the jury will necessarily hear evidence of the sort that would support punitive damages regardless of whether the Court bifurcates trial.

The Court finds that the issues in this case will be easily separable by the jury if tried together, and that Defendant will not suffer prejudice from allowing the jury to hear the professional negligence, corporate negligence, and punitive damages claims in the same proceeding. For this reason, the Court DENIES Defendant's tenth motion in limine.

K. Testimony beyond the Scope of Experts' Reports

Defendants' eleventh motion seeks to preclude Plaintiff from eliciting testimony from her experts beyond the scope of their reports. Inasmuch as Defendants do not suggest which theories they believe Plaintiff will attempt to introduce, Plaintiffs respond that Defendants' motion is so vague as to be meaningless, and further assert that she will comply with the Rules of Civil Procedure in her presentation of

testimony and evidence. Plaintiff notes that experts may present only that testimony which is within the "fair scope" of their report.[15]

At this time, the Court is without appropriate information to determine what testimony, if any, Plaintiff may attempt to have her experts present which is arguably outside of the fair scope of their expert reports, and thus construes Defendants' motion as precautionary only. In the absence of such specific information, there is no need to issue an order directing Plaintiff to comply with the Rules of Procedure governing experts generally; the Court expects she will do so, and she indicates that she will do so. Therefore, the Court DENIES Defendants' eleventh motion in limine. Defendants may make specific objections to expert testimony at the time of trial if that testimony is outside of the fair scope of the expert's report.

L. Witness who did not Care for Gary Stetts

Defendants' twelfth motion in limine seeks to preclude Plaintiff from calling caregivers without personal knowledge of Decedent and his care as fact witnesses at the time of trial. Defendants note that Plaintiff has listed numerous caregivers as potential witnesses, and argues that the testimony of any of these caregivers who have no personal knowledge of Decedent's care would be irrelevant to the claims at issue. Defendants argue that to the extent Plaintiff may attempt to elicit "bad character evidence" by calling these witnesses to testify negatively about Defendants, such evidence is inadmissible under Rule of Evidence 403(b).

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[15] Plaintiff cites *Walsh v. Kubiak*, 661 A.2d 416, 419 (Pa. Super. 1995) as describing the "fair scope rule."

Plaintiff responds that the testimony of witnesses who may not have cared for Decedent but worked at the Defendant Facility may present evidence relevant to corporate negligence and punitive damages claims. Plaintiff notes that numerous Pennsylvania cases have approved of calling employees of a facility, whether they worked directly with the plaintiff or not, to testify to, *inter alia*, "a violation of [the nursing home's] duty to formulate, adopt, and enforce adequate rules and policies to ensure quality care for its patients."[16]

The Court agrees with Plaintiff that the testimony of Defendants' employees without personal knowledge of Decedent's care may still be able to testify relevantly about conditions at the Defendant Facility in a manner relevant to corporate negligence or punitive damages.[17] Such testimony, however, must be generally consistent with this Court's rulings regarding those claims in its December 30, 2021 and March 18, 2022 Opinions and Orders, as well as the present Opinion and Order. In particular, Plaintiff may not utilize this testimony to present evidence of understaffing. For the foregoing reasons, the Court DENIES Defendants' thirteenth motion in limine. Defendants may object to the relevance of or seek an offer of proof concerning any particular witness at the time of trial.

M. Irrelevant Witnesses

Defendants' thirteenth motion in limine is premised on the same grounds as its twelfth, and Plaintiff's response thereto is similar. For the reasons discussed above,

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[16] *Scampone v. Grane Healthcare Co.*, 11 A.3d 967, 988 (Pa. Super. 2010) ("*Scampone I*").
[17] This Court's March 18, 2022 Opinion and Order discusses *Scampone I*, which clearly allowed the testimony as described by Plaintiff, in detail.

the Court DENIES Defendants' thirteenth motion. Defendants may object to the relevance of or seek an offer of proof concerning any particular witness at the time of trial.

ORDER

For the foregoing reasons, the Court hereby ORDERS as follows:

- The Court GRANTS Plaintiff's first motion in limine, except to the limited extent that 1) Defendant wishes to ask potential jurors at *voir dire* whether they are aware of Plaintiff's firm or have seen any advertisements published by Plaintiff's firm or 2) Defendant wishes to cross-examine Plaintiff's experts concerning their previous testimony in this field.

- The Court GRANTS Plaintiff's second motion in limine. If Defendants believe that a particular piece of undiscovered evidence is admissible, Defendants must receive permission from the Court before presenting such evidence at trial.

- The Court GRANTS Plaintiff's third motion in limine. Defendants are precluded from attempting to elicit expert testimony from Decedent's family members regarding his medical conditions.

- The Court GRANTS Plaintiff's fourth motion in limine. Defendants shall not raise the COVID-19 pandemic's effect on the healthcare industry.

- The Court GRANTS Plaintiff's fifth motion in limine. Defendants shall not raise Plaintiff Selena Stetts's prior workers' compensation lawsuit.

- Plaintiff has withdrawn her sixth motion in limine.

- The Court GRANTS Defendants' first motion in limine. Pursuant to this Court's December 30, 2021 and March 18, 2022 Opinions and Orders, Defendant shall not introduce testimony or evidence concerning "understaffing, undersupplying and/or underbudgeting," as it is irrelevant to the issues in this case.

- The Court DENIES Defendants' second motion in limine without prejudice to renew the objection to testimony of Decedent's

statements to family members prior to or during the testimony of Plaintiff or Mark Stetts.

- The Court GRANTS Defendants' third motion in limine. Plaintiff's expert Dr. Dupee shall not offer testimony concerning deficiencies and problematic issues in the nursing home field generally as opposed to t the Defendant Facility.

- The Court GRANTS IN PART and DENIES IN PART Defendants' fourth motion in limine. Plaintiff may present portions of DOH surveys, but only to the extent that they relate to the failure to adequately develop, enforce, or train staff in appropriate policies and procedures.

- The Court GRANTS Defendants' fifth motion in limine. Plaintiff is precluded from introducing CMS expected staffing data.

- The Court DENIES Defendants' sixth motion in limine, and finds that Dr. Dupee's qualifications are not insufficient as a matter of law to satisfy the MCARE Act.

- The Court GRANTS IN PART and DENIES IN PART Defendants' seventh motion in limine. Plaintiff is precluded from using the terms "fraud," "abuse," and "oppressive behavior" at trial. Plaintiff may use the terms "neglect" and "recklessness."

- The Court GRANTS Defendants' eighth motion in limine. Plaintiff may not present evidence or testimony concerning CMS, Medicare, Medicaid, or other governmental program reimbursement.

- The Court GRANTS IN PART and DENIES IN PART Defendants' ninth motion in limine. Plaintiff may utilize the depositions to refresh witnesses recollections, but may not admit them substantively pursuant to Rule of Civil Procedure 4020.

- The Court DENIES Defendants' tenth motion in limine. All claims in this matter shall be tried together.

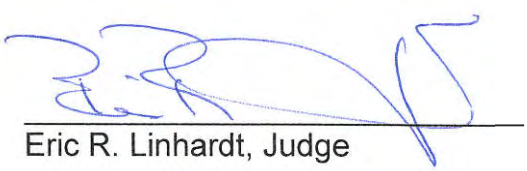
- The Court DENIES Defendant's eleventh motion in limine. Defendants may make specific objections to expert testimony at the time of trial if that testimony is outside of the fair scope of the expert's report.

- The Court DENIES Defendant's twelfth motion in limine. Defendants may object to the relevance of or seek an offer of proof concerning any particular witness at the time of trial.

- The Court DENIES Defendant's twelfth and thirteenth motions in limine. Defendants may object to the relevance of or seek an offer of proof concerning any particular witness or their testimony at the time of trial.

IT IS SO ORDERED this 27th day of June 2022.

By the Court,



Eric R. Linhardt, Judge

ERL/jcr
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