IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

BEVIN NEWLIN and STACEY LOEHRS, as Co-Administratrices of the Estate of PATRICIA O'DONNELL, deceased,	:	
Plaintiffs	:	**CV-2020-008216**
v.	:	
VITA HEALTHCARE GROUP; BRINTON MANOR CENTER SNF LLC f/d/b/a BRINTON MANOR NURSING AND REHABILITATION CENTER; IMPERIAL HEALTHCARE GROUP, LLC; BM REHAB AND NURSING CENTER, LLC d/b/a BRINTON MANOR NURSING AND REHABILITATION CENTER	:	
Defendants	:	

ORDER AND MEMORANDUM ON DEFENDANTS' MOTIONS FOR POST-TRIAL RELIEF

AND NOW, this 20th day of December, 2023, upon consideration of the Motion for Post-Trial Relief and related brief and supporting materials filed by Defendants Vita Healthcare Group, LLC ("Vita" or the "Vita Management Company") and Brinton Manor Center SNF LLC f/d/b/a Brinton Manor Nursing and Rehabilitation Center ("BM-SNF" or the "Vita Licensee/Operator" and, together with Vita and/or the Vita Management Company, the "Vita Defendants"); the Motion for Post-Trial Relief and related brief and supporting materials filed by Defendants Imperial Healthcare Group, LLC ("Imperial" or the "Imperial Management Company") and BM Rehab and Nursing Center LLC d b/a Brinton Manor Nursing and Rehabilitation Center ("BM Rehab and Nursing" or the "Imperial Licensee/Operator", and together, the "Imperial Defendants" and, together with the Vita Defendants, the "Defendants"); the Omnibus Brief in Opposition to the Motions, and supporting materials, filed by Plaintiffs Bevin Newlin and Stacey Loehrs (the "Plaintiffs"), as Co-Administratrices of the Estate of Patricia O'Donnell, deceased ("Ms. O'Donnell"); and Supplemental Briefs filed by the Vita Defendants, the Imperial Defendants, and Plaintiffs[1]; and oral argument having been held on June 16, 2023; it is HEREBY **ORDERED** and **DECREED** that the Motions for Post-Trial Relief are **DENIED IN PART** and **GRANTED IN PART** as set forth below.

On December 14, 2020, Plaintiffs initiated this nursing home negligence case, alleging that Patricia O'Donnell, now deceased, sustained a series of injuries, ultimately resulting in her death, while she was a resident at facility known as Brinton Manor Nursing and Rehabilitation Center

[1] The filings considered by the Court are at Docket Nos. 106-07, 117, 119, 132-36, and 139-41. The Court also considered the trial transcript and the transcript of the oral argument conducted on June 16, 2023.

("Brinton Manor" or the "Facility"). Plaintiffs alleged that, *inter alia*, changes of ownership and management of the Facility, a high turnover in administration and nursing staff at the Facility, and lack of implementation of nursing policies and procedures for the Facility affected the continuity of care received by Ms. O'Donnell. Altogether, Plaintiffs alleged that the Defendants were negligent and/or reckless in their care of Ms. O'Donnell, and brought claims of negligence and recklessness (Counts I & III) and corporate negligence (Counts II & IV) against the Defendants. Plaintiffs sought compensatory and punitive damages and damages under Pennsylvania's Wrongful Death and Survival Statutes.

After a five-day trial, a jury found for Plaintiffs as follows:

- They found that each of the four Defendants was negligent with respect to Ms. O'Donnell.
- They found that the negligence of each of the four Defendants was a factual cause of the harm and death to Ms. O'Donnell.
- They apportioned the liability among the Defendants as follows:
  - 15% as to BM-SNF
  - 60% as to Vita
  - 20% as to BM Nursing and Rehab
  - 5% as to Imperial
- They awarded $4 million in compensatory damages--$2 million under the Survival Act and $2 million under the Wrongful Death Act.
- They found that the conduct of each of the four Defendants was willful or wanton, or exhibited reckless indifference to the rights of Ms. O'Donnell through the Defendants' own direct conduct.
- They awarded punitive damages against the Defendants as follows:
  - $5 million against BM-SNF
  - $6.5 million against Vita
  - $2 million against BM Nursing and Rehab
  - $1.5 million against Imperial

The verdict sheet used by the jury was agreed to by all parties with the exception of one issue: whether to break out the compensatory damages, if any, into two line-items (one under the Survival Act and the other under the Wrongful Death Act). See N.T. 1/24/23 at 152.

In the Motions for Post-Trial Relief before the Court, the Defendants advance a series of arguments in support of their requests to set aside or reduce the jury's verdict by way of (1) entry of

Judgment NOV based on lack of sufficient evidence to support Plaintiffs' claims, (2) an Order directing a new trial based on (i) the verdict having been against the weight of the evidence, (ii) erroneous and prejudicial evidentiary rulings, and/or (iii) inadequate or misleading jury instructions, and (3) a remittitur of the jury's verdict, which the Defendants argue was excessive and duplicative.[2] As noted above, the Vita Defendants filed post-trial motions raising these general arguments (with specific application to the Vita Defendants) and the Imperial Defendants filed post-trial motions raising these general arguments with specific application to the Imperial Defendants). The Vita Defendants and the Imperial Defendants incorporated each other's arguments by reference, and also adopted and relied on each other's positions as advocated at the oral argument. See Oral Arg. Tr. at 33. Plaintiffs' filings in opposition to Defendants' post-trial motions were made "omnibus"-style. In resolving the Defendants' Motions, the Court adopts Plaintiffs' approach, largely because of the duplicative nature of the arguments advanced by the Vita Defendants and the Imperial Defendants, but also in light of their internal cross-references to each other's positions and the Defendants' reliance on each others' arguments, both in their written submissions and at oral argument. As such, the questions raised by Defendants' post-trial motions are the following:

- Did Plaintiffs introduce sufficient evidence at trial to establish a prima facie case of negligence against each of the Defendants?
- Did Plaintiffs introduce sufficient evidence to sustain the jury's compensatory verdict?
- Did Plaintiffs introduce sufficient evidence to support an award of punitive damages against each of the Defendants?
- Was the jury verdict against the weight of the evidence?
- Did the Court make erroneous evidentiary rulings with respect to (i) admitting the testimony of Delaware County Medical Examiner Dr. Bennett Preston; (ii) admitting evidence pertaining to certain Pennsylvania Department of Health survey reports concerning the Facility; (iii) admitting evidence pertaining to the Facility's star rating profile
- Was the increased risk of harm jury instruction on causation appropriate?
- Was there error pertaining to the verdict sheet?
- Is the compensatory damages award excessive?

[2] At trial, the Defendants were represented jointly. Post-verdict, the Vita Defendants retained separate counsel and the Imperial Defendants retained separate counsel.

- Do the punitive damages awards shock the Court's sense of justice and/or violate constitutional limitations?

As a preliminary matter, the Court sets forth (1) the legal parameters of the Plaintiffs' claims for negligence asserted against nursing home operators and management companies, and (2) the law governing compensatory and punitive damages in claims involving nursing home facilities. The facts from the trial record relevant to the various arguments follow, and then an analysis of the Defendants' arguments (in relation to the questions posed above) under the applicable standard of review for each request in the Defendants' Motions under Rule 227.1.

LEGAL FRAMEWORK FOR PLAINTIFFS' NEGLIGENCE CLAIMS

Plaintiffs in a negligence case, including against nursing home operators and management companies, may proceed on theories of direct and vicarious liability *concomitantly or alternately*. Scampone v. Highland Park Care Ctr. LLC, 57 A.3d 582, 597 (Pa. 2012) ("Scampone II"). Under a direct liability theory, plaintiffs can hold the defendant responsible for harm the defendant caused by a breach of a duty owed directly to the plaintiffs. Id. Vicarious liability imposes liability based on a relationship between parties. Thus, a corporate defendant can be held liable for the conduct of its agents (through vicarious liability principles), but it can also be responsible for negligence directly where it acts or fails to act when it has a duty to do so. Scampone II, 57 A.3d at 598. These corporate duties are described in the case law as "non-delegable duties of care", and have been classified into four general areas. See Thompson v. Nason Hosp., 591 A.2d 703 (Pa. 1991). Where a hospital is the corporate defendant, those non-delegable duties are (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment, (2) a duty to select and retain only competent physicians, (3) a duty to oversee all persons who practice medicine within its walls as to patient care, and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients. 591 A.2d at 707. These non-delegable duties have been defined and applied in other, non-hospital contexts, including in claims involving nursing homes. See Scampone II, 57 A.3d at 598 ("a corporation may also owe duties of care directly to a plaintiff . . . such as duties to maintain safe facilities, and to hire and oversee competent staff") (citing cases where such non-delegable duties were to enforce consultation and patient monitoring policies, a duty of care to maintain premises, a duty of reasonable care in hiring other employees).

In the context of cases involving nursing homes—which often involve multiple corporate entities—the Pennsylvania Supreme Court has held that "a nursing home and affiliated entities are subject to potential direct liability for negligence, **where the requisite resident-entity relationship exists to establish that the entity owes the resident a duty of care**." Scampone II, 57 A.3d at 584

(emphasis added). Whether a corporate defendant owes such a duty of care may require consideration of Section 323 of the Restatement of Torts or the so-called Althaus factors.[3] Importantly, the Pennsylvania Supreme Court in Scampone II observed that "***[t]he inquiry is individual* to each [corporate defendant],** although the duties of the [corporate defendants] may be similar. This type of **individualized inquiry into [the corporate defendants'] duties of care *ensures that multiple entities are not exposed to liability for breach of the same non-delegable duties***." Scampone II, at 606 (emphasis added).

An ***owner/operator*** of a nursing home has a non-delegable duty to render proper care to a resident where there is evidence of a direct contractual relationship with the resident, it provides direct care to the residents, and it is a licensed owner of the nursing home. Scampone III, 169 A.3d at 620; accord Hall v. Episcopal Long Term Care, 54 A.3d 381, 400 (Pa. Super. Ct. 2012) (finding that plaintiff properly brought survival claim for corporate negligence against the defendant-entity that managed all aspects of the operation of the nursing home).[4] A ***management company*** also has a non-delegable duty to render services to a resident where, for example,

- A management agreement requires the management company to develop a quality assurance program to assure that the operator provided quality nursing services to the nursing home residents and managed all aspects of the nursing home's operation. Scampone III, 169 A.3d at 618;

- The management company had to approve the budget for the staff (even though the operator set the staffing levels). Scampone III, 169 A.3d at 618.

- The management company hired and trained all of the facility's registered nurses, sent a nurse consultant weekly to oversee patient care, created the policies and procedures for the nursing home, set the budget, and supervised the nursing home's administrator. Scampone III, 169 A.3d at 618.

In Scampone III, because of evidence of the foregoing, the court concluded that the management company had a direct duty of care to the plaintiff-resident and was subject to liability for physical harm

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[3] See Althaus ex rel. Althaus v. Cohen, 756 A.2d 1166 (Pa. 2000). An Althaus analysis is not necessary and superfluous where the Restatement (Second) of Torts §§ 323 and 324A apply. See Scampone v. Grane Healthcare Co., 169 A.3d 600, 617 (Pa. Super. Ct. 2017) ("Scampone III").

[4] In Scampone I, the operator of the facility argued—like the operator-defendants in this case do—that there was no evidence that it breached the industry standard of care by not having sufficient staff to meet the needs of its residents, or that the understaffing caused the plaintiff's death; as such, the operator argued that the jury's determination that it was liable under the corporate negligence cause of action had to be set aside and JNOV entered in its favor. 11 A.3d 967, 978 (Pa. Super. Ct. 2010). The Court disagreed, not only finding ample evidence of the operator's breach of the standard of care applicable to nursing homes but also declaring "completely untenable" and "categorically reject[ing]" the operator's position that the evidence did not connect the understaffing to the plaintiff's care. Id. at 988-89 (citing Hyrcza v. West Penn Allegheny Health Sys. Inc., 978 A.2d 961 (Pa. Super. Ct. 2009) (where evidence established health care provider did not assign staff to monitor or provide plaintiff's decedent with medical care during period of patient's decline leading to death, it was sufficient to establish corporate liability).

resulting from its failure to exercise reasonable care in its performance of that duty, even though the management agreement was with the operator and not the plaintiff-resident. Scampone III, 169 A.3d at 619. "Because the management company contractually undertook to render services to the nursing home's residents by managing their care and overseeing the nursing home's operations, it should have recognized that the services were necessary for the protection of the residents, all of whom were elderly and infirm." Scampone III, 169 A.3d at 619.

The Court in Scampone III held further, however, that the **plaintiff-resident could not recover against *both* the management company and the operator of the facility for corporate negligence**. Scampone III, 169 A.3d at 621. Only the owner/operator could be liable for corporate negligence because, "[w]hile the owner/operator is free to assign its performance of a non-delegable duty [to formulate, adopt, and enforce adequate rules and policies to ensure quality patient care] to a management company, such action will not eliminate its legal responsibility for the management company's negligent performance." Scampone III, 169 A.3d at 621. **However, the plaintiff-resident may recover from both entities (operator and management company) *for the negligence of each entities' employees*.**[5]

To succeed on a direct liability negligence claim against the ***owner/operator*** entity, the evidence must show that the defendant had actual or constructive knowledge of the defect or procedures which created the harm. Thompson, 591 A.2d at 708; accord Hall, 54 A.3d at 400 n.10 ("[T]o hold the managing entity liable for corporate negligence [related to improper staffing of a nursing home][6], the plaintiff must show the managing entity had actual or constructive knowledge of the understaffing and that the understaffing was a substantial factor in bringing about harm") (citing Scampone I). In addition, the defendant's negligence must have been a substantial factor in bringing about the harm to the injured party. Id. (citing Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978)).

The type of evidence necessary to prove a corporate negligence claim is the same type require in a traditional medical malpractice action—where the defendant's negligence is not obvious, a plaintiff must present expert testimony to establish to a reasonable degree of professional certainty

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[5] As noted above, in Scampone, the management company voluntarily assumed a duty towards the plaintiff-resident through its contract with the nursing home. Scampone III, 160 A.3d at 622. There was evidence that the management company's employees' acts and omissions in performing its contractual duties (including duties related to staffing issues) breached those duties, and the plaintiff-resident's expert linked these deficiencies to the resident's death, the jury could find that insufficient staffing levels were a contributing factor in the inability of the nursing home employees to provide proper care to the residents. Scampone III, 160 A.3d at 623. As such, the management company was exposed to liability for its employees' actions and inactions.

[6] In Hall, the "managing entity" was the entity that *actually operated* the nursing home in all respects. Claims against other parties allegedly involved were dismissed prior to trial.

that the defendant's acts deviated from an accepted standard of care and that the deviation was a substantial factor in causing harm to the plaintiff. Welsh v. Bulger, 698 A.2d 581, 585 (Pa. 1997) (emphasis added). An expert's report is not required to contain "magic words." Welsh, 698 A.2d at 585–86. Instead, courts look at the substance of the expert evidence presented. Id. at 586. Neither do corporate negligence cases require special "corporate negligence experts"; they simply require one or more experts whose testimony (alone or together) support the conclusion that there was a deviation from a standard of care implicated by the defendant's corporate duties and that the deviation was a substantial factor in bringing about the harm. See Welsh, 698 A.2d 581; accord Rauch v. Mike-Mayer, 783 A.2d 815, 827 (Pa. Super. Ct. 2001) (finding that expert reports of an internist/emergency physician and neurologist/psychiatrist together established a deviation from the standard of care and that the deviation was a substantial factor in bringing about the harm).

IMPLICATIONS OF THE ABOVE-CITED LAW WITH RESPECT TO PLAINTIFFS' CLAIMS

Defendants argue that under the Scampone cases and Hopkins v. Compass Pointe Healthcare, LLC, 262 A.3d 471 (Pa. Super. Ct. 2021), only one entity can have a non-delegable duty in a corporate negligence case. See, e.g., Oral Arg. Tr. at 36 & 38, 55-57, 59-60. Specifically, the Defendants argue that Hopkins and Scampone hold that a management company cannot as a matter of law be liable for corporate negligence because *only the operator* has the non-delegable duty. Oral Arg. Tr. at 53-56. Both management companies *and* licensee operators can be responsible for negligence through principles of vicarious liability. See Oral Arg. Tr. at 55.

Defendants are largely correct.[7] The management companies in this case were Vita and Imperial; the licensees were the operators of the Facility: BM-SNF (under management of Vita) and BM Rehab and Nursing (under management of Imperial). Under the Scampone line of cases, as a matter of law, Plaintiffs can recover only from *BM-SNF and BM Rehab and Nursing—the operators of*

[7] The Defendants overstate the Supreme Court's pronouncement in Scampone II about the duties of care owed by multiple corporate defendants and how a plaintiff demonstrates that the defendants have duties. Nowhere in the Scampone cases do the courts preclude multiple corporate defendants from having the same or similar duty to a resident. Indeed, as noted above, the duties of the various corporate entities may not only be similar, they may be the same. The documents and testimony in this case, including but not limited to the testimony highlighted hereinbelow from Nurse Frederick, Dr. Seignious, Mr. Tosh, Mr. Stern, Ms. Spiegel, and Mr. Silberberg, all together implicate the Defendants' duties to its residents, including Ms. O'Donnell. The limitations established in Scampone relate to *how* the plaintiff-resident can *recover* from the various corporate entities who have breached a duty. That is, while a plaintiff-resident cannot *recover* from both the management company (in our case, Vita and Imperial) and the operator (BM-SNF and Brinton Manor Nursing & Rehab) for corporate negligence, see Scampone III, 169 A.3d at 621 (finding that only the owner/operator could be liable for corporate negligence because, "[w]hile the owner/operator is free to assign its performance of a non-delegable duty [to formulate, adopt, and enforce adequate rules and policies to ensure quality patient care] to a management company, such action will not eliminate its legal responsibility for the management company's negligent performance"), the plaintiff-resident *may* recover from *both* the operator of the facility and the management company for the negligence of each entities' employees. Scampone III, 160 A.3d at 621.

the facility—for corporate negligence. See supra (discussion of applicable case law). And although Plaintiffs may, as a matter of law, recover from both entities (operator and management company) *for the negligence of each entities' employees—i.e., via vicarious liability*, see supra (discussion of applicable case law), Plaintiffs represented at oral argument that they did not intend to establish liability against the management companies via vicarious liability: "The jury made their decision on all four Defendants, and to be clear, **the management companies were always just corporate negligence or direct negligence**, and then **the licensee had vicarious [liability]**." Oral Arg. Tr. at 182-83 (emphasis added). But as a matter of law, the management companies (Vita and Imperial) *cannot be liable for direct, corporate negligence*. As such, the claims against the Vita Management Company and Imperial Management Company fail as a matter of law and entry of JNOV, see infra, is appropriate as to Vita Healthcare Group and Imperial Healthcare Group, LLC.[8]

In light of the foregoing, Plaintiffs' negligence claims against the Vita Licensee/Operator (BM-SNF) and the Imperial Licensee/Operator (BM Rehab and Nursing)—and the evidence in support of those claims—will be examined through the lens of vicarious liability under the applicable post-trial standards. That is, Plaintiffs' ability to recover from the licensee-operators (BM-SNF and BM Rehab and Nursing) requires evidence (under the applicable standards of JNOV and/or new trial) that one or more of those entities' employees acted negligently. Since their claims against Vita and Imperial "were always just corporate negligence or direct negligence" (and not vicarious liability claims), Oral Arg. Tr. at 182-83, and that claim against those entities fails as a matter of law, see supra, no analysis is required as to (1) whether there is a duty (under Althaus or the Restatement) or evidence in support of a corporate negligence claim against Vita and Imperial, or (2) whether there is evidence to hold the management company responsible for the acts of the operator via vicarious liability.

DAMAGES IN NURSING HOME NEGLIGENCE CASES

Judicial reduction of a jury award for compensatory damages is appropriate only where the award is plainly excessive and exorbitant in a particular case. Dubose v. Quinlan, 125 A.3d 1231 (Pa. Super. Ct. 2015) (internal citations omitted). The large size of a verdict is in itself not evidence of excessiveness. Id. "The trial court may only grant a request for remittitur when a verdict that is supported by the evidence suggests that a jury was guided by partiality, prejudice, mistake, or corruption." Id. (internal citations omitted). Where there is evidence that a nursing home resident arrived at the facility with pre-existing injuries but developed festering bedsores that led to her

[8] The Court agrees with the Defendants that entry of JNOV with respect to the claims against the management companies means that any damages awarded with respect to those claims—including punitive damages awards—cannot stand. See Defendants' Supplemental Briefs. Punitive damages are incident to a cause of action, not a claim itself.

demise, and there was evidence that she suffered from other forms of neglect during her residency, a jury has discretion to award compensatory damages based on their perception of the evidence. Id. (finding jury's compensatory award of $1,000,000 under Survival Act and $125,000 under Wrongful Death Act not shockingly excessive, noting that "matters of credibility are for the jury, and they are free to believe all, part, or none of the evidence presented").

Punitive damages are appropriate where there is evidence of a defendant's "outrageous conduct", defined as conduct showing an evil motive or **reckless indifference to the rights of others**. Dubose, 125 A.3d at 1240 (internal citations omitted). The evidence must show that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed, and (2) the defendant acted or failed to act in conscious disregard of that risk. Id. (internal citations omitted). *Whether a person's actions arise to "outrageous conduct" "**lies within the sound discretion of the fact-finder**"*. Id. (emphasis added). Where a plaintiff establishes a defendant's reckless neglect of the nursing home resident, leading to the development of numerous festering bedsores, the matter of punitive damages is for the jury to decide. Id. Where there is sufficient evidence of substandard care to the point of reckless indifference, punitive damages may be assessed by a jury. Id.

FACTS OF THIS CASE

In March 2018, Patricia O'Donnell became a resident at Brinton Manor. N.T. 1/18/23 at 116. At that time, the Facility was owned by an entity other than the Defendants. On June 1, 2018, BM-SNF became the licensee/operator of the Facility. N.T. 1/18/23 at 117. BM-SNF operated the Facility under the name Brinton Manor. N.T. 1/18/23 at 117. BM-SNF carried out its duties for the Facility pursuant to a management agreement with Vita. N.T. 1/18/23 at 117. The management agreement between BM-SNF and Vita identifies BM-SNF as the licensee and/or operator, and Vita as the manager. N.T. 1/18/23 at 121 & Ex. P-49. The management agreement requires the manager (Vita) to prepare a budget for approval by the operator (BM-SNF). N.T. 1/18/23 at 123 & Ex. P-49.[9]

Between 2017 and 2021, Aharon Stern was a licensed nursing home administrator [Stern Dep. at 6-7[10]]. At some point during that time period, Stern "joined the healthcare group" (described by

[9] The management agreement also identifies various services that the manager (Vita) was to provide in order for the Facility to operate, including pharmacy, consults, resident relations, maintaining visibility of a management presence, helping with personnel (including administrators and managers), and service contracts. N.T. 1/18/23 at 123-24 & Ex. P-49. In exchange for providing these services, the manager (Vita) received a monthly fee. N.T. 1/18/23 at 124-25 & Ex. P-49. For the one-year time period that Vita served as manager for Brinton Manor (June 1, 2018 through June 30, 2019), Vita received management fees totaling $432,442.00 from the Vita Licensee/Operator, BM-SNF. N.T. 1/18/23 at 125-26 & Ex. P-47.

[10] Stern's videotaped deposition testimony was introduced into the trial record by Plaintiffs during their case-in-chief, without objection from Defendants. It is attached in full to Plaintiffs' Omnibus Response to Defendants' Post-Trial Motions.

Stern as the "Vita Healthcare Group") and "went over to Brinton Manor" as the Administrator [Stern Dep. at 10-11]. He served as Administrator for Brinton Manor for approximately six (6) months [Stern Dep. at 26]. Stern testified that, at the time he joined the Facility, Vita already owned three or four other nursing homes and were purchasing four more, including the Brinton Manor Facility [Stern Dep. at 13]. Prior to taking on the role as Administrator for Brinton Manor, Stern conducted "a little bit" of research about the Facility, including looking at the star rating and reviews of the facility, and learned that Brinton Manor had "not such a great reputation" [Stern Dep. at 15]. Stern would always alert "Vita" when the state conducted surveys of the Facility; if fines resulted from such surveys, "Vita" would pay them [Stern Dep. at 33-34].

After June 30, 2019, and as of July 1, 2019, BM Rehab and Nursing Center operated the facility under the name Brinton Manor. N.T. 1/18/23 at 118. BM Rehab and Nursing Center carried out its duties for the facility pursuant to a management agreement with Imperial. N.T. 1/18/23 at 118. The management agreement between BM Rehab and Nursing Center and Imperial identifies BM Rehab and Nursing Center as the operator, and Imperial as the manager. N.T. 1/18/23 at 126-27 & Ex. P-35. The management agreement requires the manager (Imperial) to prepare a budget for the facility for approval by the operator (BM Rehab and Nursing Center). N.T. 1/18/23 at 127 & Ex. P-35.[11] After Imperial acquired the Brinton Manor facility from Vita, Imperial hired a new nursing home administrator for Brinton Manor [Steg Dep. at 23[12]]. Imperial tracks and looks at and consults with the facilities they manage about the facility's "star rating" because that is an important thing for quality of care and ensuring that the residents are taken care of [Silberberg Dep. at 26-27[13]]. Silberberg testified that Imperial is "constantly aware" of the star rating and consulting with the building (the facility) about it [Silberberg Dep. at 27-28]. Imperial, as the management company, "tracks" the star ratings [Silberberg Dep. at 28].

BM-SNF was aware that Ms. O'Donnell was a fall risk. N.T. 1/18/23 at 177. And nine months after becoming a resident at the Facility, Ms. O'Donnell fell and fractured her hip in December of

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[11] The management agreement also identifies various services that the manager (Imperial) was to provide in order for the facility to operate, including resident relations with the management presence, personnel advice including administrator and service contracts. N.T. 1/18/23 at 128 & Ex. P-35. In exchange for providing these services, the manager (Imperial) received a monthly fee. N.T. 1/18/23 at 128 & Ex. P-35. For the fiscal year 2019, during which Imperial served (as of July 1, 2019) as manager for Brinton Manor, Imperial received management fees totaling $484,000.00 from the operator, BM Rehab and Nursing Center. N.T. 1/18/23 at 129.

[12] Steg's videotaped deposition testimony was introduced into the trial record by Plaintiffs during their case-in-chief, without objection from Defendants. It is attached in full to Plaintiffs' Omnibus Response to Defendants' Post-Trial Motions.

[13] Silberberg's videotaped deposition testimony was introduced into the trial record by Plaintiffs during their case-in-chief, without objection from Defendants. It is attached in full to Plaintiffs' Omnibus Response to Defendants' Post-Trial Motions.

2018, requiring surgery. N.T. 1/18/23 at 134-46; 261-62; 267-68. Brinton Manor staff documented the fall and created an event report that the Facility's Director of Nursing, Bridget Alvanos, filed with the Pennsylvania Department of Health. N.T. 1/18/23 at 268-71. Ms. Alvanos's report of the incident represented to the Department of Health that the care plan for Ms. O'Donnell at the time was appropriate. N.T. 1/18/23 at 271-72. When Ms. O'Donnell returned to the Facility, the Facility's staff evaluated her and updated her plan of care. N.T. 1/18/23 at 272-73.[14] Ms. O'Donnell's general condition had begun to deteriorate, including Ms. O'Donnell experiencing anxiety, depression, malnutrition, and skin deterioration, the last of which caused her to develop a painful stage four sacral wound. N.T. 1/18/23 at 134-46. She "required extensive assistance from staff of two people and—for bed mobility, turning and repositioning in bed, transferring out of bed and into bed and into a chair, toilet use and personal hygiene and bathing and that sort of thing." N.T. 1/18/23 at 185. Soon after her return to Brinton Manor, Ms. O'Donnell suffered another fall. N.T. 1/18/23 at 186. After the late-December fall, Ms. O'Donnell's anxiety increased and she developed significant behavioral issues that led to her being transferred temporarily to a psychiatric facility. N.T. 1/18/23 at 190-93. Her condition during the time leading up to her transfer was documented in records from the nurses and physical therapists providing care for Ms. O'Donnell. N.T. 1/18/23 at 187-92. She returned to Brinton Manor on March 12, 2019. N.T. 1/18/23 at 193. At the time of re-admission, the nursing admission statement in the Facility's records reflected that Ms. O'Donnell was still anxious (particularly about falling), incontinent of bowel and bladder, but had no skin breakdown. N.T. 1/18/23 at 193-94. She did suffer an additional fall after her return, in April 2019. N.T. 1/18/23 at 194. Around that time, a dietitian noted in the Facility's records that Ms. O'Donnell was losing weight and Ms. O'Donnell's dentures were lost. N.T. 1/18/23 at 195. During the June/July 2019 time frame, the Facility's records reflect there was at least one "skilled intervention" because of Ms. O'Donnell's inability to chew certain foods due to not having dentures; a dietician recommended nutritional supplements and Ms. O'Donnell was referred to speech and occupational therapy. N.T. 1/18/23 at 200-03.

In May of 2019, Ms. O'Donnell developed pressure ulcers, and the Facility's notes (from a nurse practitioner and dietician) reflected that she was complaining of pain. N.T. 1/18/23 at 198-99. Ms. O'Donnell's sister visited her at the Facility, and reported to the staff that Ms. O'Donnell was in "terrible pain." N.T. 1/19/23 at 9. Brinton Manor staff told Ms. O'Donnell's sister that Ms. O'Donnell "was making it up" but agreed to give her pain medication. N.T. 1/19/23 at 9-10. The staff also told Ms. O'Donnell's sister that Ms. O'Donnell's bedsore was healing. N.T. 1/19/23 at 10. Ms. O'Donnell

[14] The "they" in this portion of Nurse Frederick's testimony clearly refers to the Facility's nursing staff. See, e.g., N.T. 1/18/23 at 273-75.

was seen on a weekly basis by a Vohra wound physician, and her pressure injuries healed by July 2, 2019. N.T .1/18/23 at 205. Thereafter, however, Ms. O'Donnell developed additional pressure wounds. N.T. 1/18/23 at 206. The Vohra wound physician offered testimony that he believed that the deterioration of Ms. O'Donnell's wounds were not due to any improper care by the Brinton Manor staff, see N.T. 1/18/23 at 320, and that during the time he provided care for Brinton Manor residents in 2018 and 2019, he did not have any concerns that Brinton Manor staff were not taking proper steps to prevent facility-acquired pressure wounds (by turning or repositioning or otherwise) or that residents were not receiving proper care by the nursing staff. See N.T. 1/18/23 at 321. On July 21, 2019, Ms. O'Donnell was taken via ambulance to Riddle Hospital, where she was treated for an infected, stage-four sacral wound. N.T. 1/18/23 at 218, 223-26. Eventually, Ms. O'Donnell's pain from the sacral wound became difficult to manage due to positioning and extent of the wound; she was placed on hospice on August 1, 2019, and she passed away on August 5, 2019 from hydromorphone/dilaudid. N.T. 1/18/23 at 230.

The Delaware County Medical Examiner, Dr. Bennett Preston, conducted an autopsy of Ms. O'Donnell, reviewed a police report and medical records from Riddle Hospital, and concluded that the hospital records' conclusion as to cause of death was correct: sepsis due to decubitus ulcer due to or as a consequence of bacteremia and contribute to by diabetes, chronic congestive heart failure, and failure to thrive. N.T. 1/20/23 at 176-78. Dr. Preston also testified that (1) the immediate cause of Ms. O'Donnell's death was hydromorphone intoxication, due to the fact that she was placed in hospice, and (2) the proximate cause of her death was complications from the sacral decubitus ulcer, which is "what put her in the hospital in the first place." N.T. 1/20/23 at 177-78. Dr. Preston believed that there is a relationship between Ms. O'Donnell's sacral ulcer and her death, and he put that on his final death certificate. N.T. 1/20/23 at 178-80. Dr. Preston's conclusions were consistent with the conclusions of the records he reviewed from, *inter alia*, Riddle Hospital, and the conclusion of one of the hospital's doctors, Dr. Ezekiel Adwale, according to whose records the cause of Ms. O'Donnell's death was sepsis, osteomyelitis, sever protein calorie malnutrition. N.T. 1/20/23 at 179-85.

During the time of Ms. O'Donnell's residence at Brinton Manor, the Facility received citations for various deficiencies. N.T. 1/18/23 at 235-36. None of the cited deficiencies involved Ms. O'Donnell, although the type of care underlying the citations—care planning, nutrition, hydration, pain management—were similar to the issues raised by Plaintiffs in this case with respect to Ms. O'Donnell's care. N.T. 1/18/23 at 235-36. The Facility was not cited by the Department of Health in connection with Ms. O'Donnell's death, despite the fact that Plaintiffs submitted a complaint to the Department of Health after their mother's death. N.T. 1/18/23 at 236-37. Similarly, despite the

Plaintiffs having filed a complaint with the police department and an investigation by the criminal investigation unit, the conclusion was that they could not substantiate care-dependent neglect on behalf of Brinton Manor and, from a nursing perspective, did not recommend continuing investigation. N.T. 1/18/23 at 237-39.

JNOV

On a motion for JNOV, a court determines whether there is sufficient competent evidence to sustain the verdict. Dubose, 125 A.3d at 1237 (Pa. Super. Ct. 2015); see also Ruff v. York Hosp., 257 A.3d 43, 48 (Pa. Super. Ct. 2021). The evidence must be viewed in the light most favorable to the verdict winner, who must be given the benefit of every favorable inference; all unfavorable testimony and inferences must be rejected—any conflict in the evidence is resolved in the verdict winner's favor. See Dubose, Ruff, supra; see also Ty-Button Tie, Inc. v. Kincel & Co., 824 A.2d 685, 690 (Pa. Super. Ct. 2002). If there is any basis on which a jury could have properly made its award, the Court must deny a motion for JNOV. Daniel v. Wyeth Pharms., Inc., 15 A.3d 909, 923 (Pa. Super. Ct. 2011); Simon v. Wyeth Pharms., Inc., 989 A.2d 356, 365 (Pa. Super. Ct. 2009). A court may enter a Judgment NOV only where the movant is entitled to judgment as a matter of law or in clear cases where the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. Moure v. Raeuchle, 604 A.2d 1003, 1007 (Pa. 1992); Nelson v. Airco Welders Supply, 107 A.3d 146, 155 (Pa. Super. Ct. 2014).

As noted above, Plaintiffs' claims against the management companies, Vita and Imperial—which (according to Plaintiffs) "were always just corporate negligence or direct negligence", Oral Arg. Tr. at 182-83—fail as a matter law, since only the *operators* of the facility (BM-SNF and BM Rehab and Nursing) can be held responsible for corporate negligence. And since Plaintiffs clarified at Oral Argument that they pursued claims for "regular" negligence (via vicarious liability) only against the licensee operators, JNOV must be entered as to Defendants Vita Healthcare Group and Imperial Healthcare Group, LLC, and the remaining question for resolution on the post-trial Motion for JNOV is, is there sufficient evidence to hold BM-SNF and BM Rehab and Nursing liable for the negligence of their respective agents? Put differently, is there evidence that agents of BM-SNF and BM Rehab and Nursing had a duty to Ms. O'Donnell, that they breached that duty, that such breach was the proximate cause of her harm and resulting damages under the above-referenced standards governing motions for JNOV?

In support of their negligence claims, Plaintiffs presented three (3) experts with respect to duty, breach, causation, and/or damages. As suggested by Plaintiffs, Suzanne Frederick, R.N. ("Nurse Frederick") testified as to each of these elements of Plaintiffs' negligence claims; Ernest Tosh, J.D.

("Mr. Tosh") was a "fact summary witness" who provided expert testimony as to the staffing with respect to the Defendants; and David Seignious, M.D. ("Dr. Seignious") provided expert testimony "primarily about causation, in addition to violations of the standard of care by nursing staff employed by the Defendants." Pls.' Br. at 12. The Court calls attention to portions of these experts' testimony as to each of the necessary elements of Plaintiffs' negligence claims as set forth below:

NURSE FREDERICK

- At the onset of her testimony at trial, Plaintiffs' standard of care expert Nurse Frederick made clear the distinctions between the entities involved with Brinton Manor. N.T. 1/18/23 at 117-18. Her subsequent testimony with respect to the various Defendants' duties to Ms. O'Donnell, and their breaches of those duties, included the following:

Q: **[W]hen the licensee** that was in a management agreement with Vita Healthcare **took over [Brinton Manor] in June [2018], were they aware that Patricia was a fall risk?**
A: Yes.
Q: . . . [S]he had several falls prior to Vita taking over, correct?
A: That's correct. [15]
. . .
Q:[O]n admission to Brinton Manor, Patricia O'Donnell was assessed by the nursing staff . . . to be at risk for falls, correct?
A: Yes.
Q: And as a result, Brinton Manor put in place several interventions to mitigate against the risk of injury due to falls, correct?
A: Well, they had a plan of care, a care plan. That is a plan. That does not mean it was done . .. Yes, they did.[16]
. . .
Q:[A]fter . . . Brinton Manor SNF LLC took over the operation of the facility from Genesis [the prior operator of the facility], the Brinton Manor staff continued to assess her as a fall risk, correct?
A: Yes.
. . .
Q: [S]o the staff at that time . . . on July 9th, 2018, which was shortly after Brinton Manor SNF took over operation of the facility, correct?
A: Yes.
Q: . . . So they document that the resident was at risk for falls . . . ?
A: Yes.[17]

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[15] N.T. 1/18/23 at 177.

[16] N.T. 1/18/23 at 239. The "they" in this portion of Nurse Frederick's testimony clearly refers to Brinton Manor and its nursing staff.

[17] N.T. 1/18/23 at 240-41. See also N.T 1/18/23 at 242, 244 (acknowledging that Brinton Manor staff was making certain assessments of Ms. O'Donnell at that time); N.T. 1/18/23 at 241-61 (Nurse Frederick testimony about care provided and steps taken by various members of the Facility's staff, including nurses, between July and December 2018, in which references to "they" clearly refer to Brinton Manor and its staff); N.T. 1/18/23 at 262-69 (Nurse Frederick testimony about care provided and steps taken by various members of the Facility's staff, including nurses, after Ms. O'Donnell's fall on December 12, 2018, in which references to "they" clearly refer to Brinton Manor and its staff); N.T. 1/18/23 at 277-310 (Nurse Frederick testimony about care provided and steps taken by various members of the Facility's staff, including nurses and the Vohra wound consultant, at the time when BM-SNF was the licensee/operator of the Brinton Manor Facility; and references to "they" in this testimony clearly refer to Brinton Manor and its staff); N.T. 1/18/23 at 310-19 (Nurse Frederick testimony about care provided and steps taken by various members of the Facility's staff, including nurses and the Vohra wound consultant, at the time when BM Rehab and Nursing was the licensee/operator of the Brinton Manor Facility; and references to "they" in this testimony clearly refer to Brinton Manor and its staff).

. . .

Q: At [the] time [when Ms. O'Donnell was admitted to Brinton Manor], the facility documented her to be a risk for skin breakdown.

. . .

A: Right. Yeah.

Q: And so she was assessed by the nursing staff to be at risk for skin breakdown . . . and even at that time, she had limited mobility, correct?

A: Yes.

Q: And in fact, she was assessed by the facility to be at risk for skin breakdown really throughout her entire residency at the facility, correct?

A: Yes. Some degree of risk, yes.

Q: The same thing for falls. She was assessed to be a fall risk during her entire admission, correct?

A: Yes.[18]

. . .

Q: Did the Defendants—either the licensee or the company that was their management company, Vita—did either of them produce any fall policies and procedures in discovery?

A: No.[19]

. . .

Q: Starting with the fall with the hip fracture on December 12th of 2018. . . explain to the jury how the licensee and Vita deviated from the standard of care that caused this harm?

A: . . . They knew that she had a history of falls which puts someone at risk for further falls. . . . [S]taff should have been closer to her, supervising her. . . . [D]iarrhea . . . was not noted by the nurses in the nursing home. . . . [T]hese nurses should have been assessing her for symptoms of urinary tract infections. . . . [T]here's no indication that they were assessing her for those and they should have been really doing a proper job of assessing her for urinary tract infection well before that. . . . [They failed] to assess and intervene and supervise her more closely while she was ambulating."[20]

. . .

Q: [W]hen is the nursing staff supposed to assess her to have noted that she has diarrhea or vomiting or seems mentally off and might have a UTI?

A: [T]hey should note it—notify the physician that that is occurring and the family immediately . . . or timely at least. . . .

Q: And had they assessed that she had that change of condition . . . should they have documented that?

A: Yeah. They should have documented it in the nurse's notes. . . . They . . . should have notified the physician and . . . gotten some lab work orders . . . and keep a closer eye on her.[21]

. . .

Q: [I]f [Ms. O'Donnell] had been identified with the signs of infection and she had been supervised by staff, could that have mitigated the risk of injury?

A: Yes.[22]

- With respect to Ms. O'Donnell's fall at the end of December 2018, Nurse Fredericks testified that "[s]he was being transferred by a single CNA, not two people . . . her knees buckled, which should have been anticipated. That's why she was supposed to be a two-person transfer." . . .

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[18] N.T. 1/18/23 at 276-77.

[19] N.T. 1/18/23 at 177.

[20] N.T. 1/18/23 at 177-79.

[21] N.T. 1/18/23 at 180-81. Nurse Frederick's (and Plaintiffs' counsel's) use of "they" in these sections of her testimony clearly refers to the nursing staff at the Facility. See also N.T. 1/18/23 at 181-82.

[22] N.T. 1/18/23 at 183.

Q: So if she's supposed to be a two-person during transfers, is that a deviation of the standard of care to only have one person . . ."

A: Yes, a big one.[23]

- With respect to the Facility's records when Ms. O'Donnell was re-admitted after a stay at a psychiatric facility, Nurse Frederick testified that "she should have been noted to be at risk for skin breakdown just because she was dependent on the staff." N.T. 1/18/23 at 194.
- With respect to Ms. O'Donnell's weight loss, beginning in April 2019, Nurse Frederick testified that while a dietician's note in the facility's records reflect that Ms. O'Donnell's weight had decreased, Nurse Frederick "[didn't] know of any, you know, other interventions really." N.T. 1/18/23 at 195. Likewise, Nurse Frederick testified as follows with respect to Ms. O'Donnell's missing dentures:

Q: Is there any indication in the nursing notes that nursing identified that she had lost her dentures?
A: No.
Q: And had they done anything about that?
A: No.
Q: Are they supposed to?
A: Yes. There's a federal regulation . . . regarding lost dentures and within three days the facility's supposed to take them to the dentist and have them evaluated and basically, they should replace the dentures. But they should act on it immediately.
. . .
Q: . . . So it says that the facility must have a policy identifying the circumstances when a loss or damage of dentures is the facility's responsibility and may not charge the resident for loss of dentures in accordance with a policy that might be the facility's responsibility. . . .
A: Yes.
Q: And if they can't, they have to document why they didn't.
A: Right.
Q: Then it says, the facility must provide documentation of what they did to ensure the resident could still eat and drink adequately . . .
A: Right.
Q: Was any of that done or noted in the progress notes?
A: No.
. . .
Q: Failure to do that, was that a deviation from the standard of care?
A: Yes, it was.[24]

- With respect to the pain that Ms. O'Donnell experienced beginning in May of 2019 when she developed pressure ulcers, Nurse Frederick's testimony was as follows:

Q: [W]as the facility supposed to be addressing her pain?
A: Absolutely.
Q: And did you see notes that they were actually addressing her pain and making sure that her pain was relieved?
A: Well, there are notes that she was given pain medication by nurses, not in a coordinated fashion. . . . A nurse should do that and get at the root cause of the problem. They are required to do that, to attempt to. They're supposed to

[23] This testimony does not identify which of the Defendants breached a standard of care.

[24] This testimony does not identify which of the Defendants breached a standard of care.

monitor meal intake . . . they need to assess and investigate . . . [T]hey were cited—I don't remember the date, but for food that was not palatable, not good.[25]

- Nurse Frederick described Ms. O'Donnell's weight loss at the Facility as "significant" and testified as follows:

> Q: And that weight loss, did that occur **under both licensees** that were managed by both Vita and Imperial?
> A: Yes.[26]

- Nurse Frederick testified that she never saw any nursing notes in the records she reviewed that Ms. O'Donnell was provided a particular air mattress that Nurse Frederick said would have reduced the pressure on Ms. O'Donnell's tailbone around which she developed pressure wounds. N.T. 1/18/23 at 207-08. She also testified that the pressure wounds Ms. O'Donnell suffered were "not unavoidable." N.T. 1/18/23 at 208. She testified further that "they" needed to be timely with . . . cleaning her skin and that sort of thing." N.T. 1/18/23 at 208.[27]
- During the time period when Ms. O'Donnell began experiencing renewed and repeated pressure ulcers—in early July 2019—Nurse Fredericks testified as follows as to the Defendants:

> Q: [I]s that right **when the licensee** who has had a management agreement with Imperial, is that right when they **took over**?
> A: It is.
> Q: Is that when we saw that there were gaps and interim Administrators and Directors of Nursing?
> A: It is, yes.
> Q: According to Ernie Tosh, the staffing expert, . . . under Imperial as managing company, was the facility also still staffing below the expected staffing in aides?
> A: Yes.
> Q: And in RNs?
> A: Right.[28]

- Nurse Frederick's testimony about what the Facility is required to do was as follows:

> Q: [I]n order to say that a wound is unavoidable, . . . don't they have to show that they were doing intervention?
> A: Yes. There is a standard definition of unavoidable . . . by . . . [the] National Pressure Injury Advisory Panel, but that is the regulations and CMS adopted that definition. And what it says is that . . . a facility has to show that they did everything to prevent it which means proper assessment, care planning, implementing a professional accepted plan of care. . . . really each shift nurse should but at least daily doing a real thorough skin assessment to catch it early and jump on it. Notify the doctor, . . . being consistent in that plan of care.[29]

- She also testified about the Facility's records, which reflected a lack of documentation of the various interventions—including turning and repositioning of Ms. O'Donnell:

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[25] This testimony does not identify who "they" are, but in the context of Nurse Frederick's testimony here, a reasonable inference is that the nurses and/or the Facility is the "they".

[26] N.T. 1/18/23 at 204-05.

[27] There is no indication to whom "they" referred, but in the context of Nurse Frederick's testimony on this point, a reasonable inference is that "they" referred to the nurses at the Facility.

[28] N.T. 1/18/23 at 209-10.

[29] N.T. 1/18/23 at 210-11.

Q: [A]re they supposed to document . . . when they do turning and repositioning?
A: Yes.
. . .
Q: Is that a deviation from the standard of care to – failure to turn and reposition all those times?
A: Yes.[30]
. . .
Q: The failure to turn and reposition and failure to be on an air mattress during that time [between July 2, 2019 and July 8, 2019], was that a deviation from the standard of care?
A: It was, yes.
Q: And did that cause her harm?
A: Absolutely, yes.[31]
. . .
Q: Is it really possible for a wound to worsen and get infected in five days [between July 16 and 21, 2019]?
A: It is depending on the environment that wound's in. If they're not turning and repositioning . . . if she's not being turned and repositioned and she's laying in feces and urine, yes, absolutely it can.
Q: Were nurses [in that time frame] . . . assessing [Ms. O'Donnell] and documenting assessments?
A: . . . No.
Q: Were they even indicating in the progress notes that they were aware that there was a wound and . . . looking for pain or infection?
A: No.[32]

- Nurse Frederick also offered an opinion that the Facility's records, including "pre-charting" (making entries prior to the time the actual nursing was provided) and blank spaces (reflecting that no nursing was provided at a particular time) were not reliable: "They're just filling in the blanks, you know. You can't rely on it to be accurate that it occurred at that time." N.T. 1/18/23 at 215; see also N.T. 1/18/23 at 218-20.[33] Additional testimony on this point was the following:

Q: [A]re they documenting that they're checking [on Ms. O'Donnell] on [July] 22nd and the 23rd?
A: Yes.
Q: And that's when she's in the hospital?
A: Yes.[34]

- Additional testimony from Nurse Frederick as to standard of care and a breach thereof included the following:

Q: . . . [W]as it a deviation of the standard of care for the nurses to not recognize the altered mental state, the change of condition in Patricia O'Donnell that the daughters saw when they got there [on July 21, 2019]?
A: Absolutely.

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[30] This testimony does not identify which of the Defendants breached a standard of care. Moreover, there is no indication to whom "they" referred, but in the context of Nurse Frederick's testimony on this point, a reasonable inference is that "they" referred to the nurses at the Facility.

[31] This testimony does not identify which of the Defendants breached a standard of care or caused a resulting harm to Ms. O'Donnell.

[32] The "they" here clearly refers to the nurses and/or nursing staff at the Facility.

[33] There is no indication to whom "they" refers, but in the context of Nurse Frederick's testimony on this point, a reasonable inference is that "they" referred to the nurses at the Facility, including but not limited to Nurse Gertrude Mutiwazuka.

[34] The "they" here clearly refers to the nurses and/or nursing staff at the Facility.

Q: Was it a deviation of the standard of care for them to dismiss the symptoms and refuse to bring it to the doctor's attention?

A: Yes.[35]

. . .

Q: The blank spaces in the [Activities of Daily Life charting], pre-charting, false charting, failure to assess, did all of that increase [Ms. O'Donnell's] risk of harm of wound worsening and infection"

A: Yes.

Q: And did it actually cause her worsening wound infection?

A: Yes. In my opinion it did. [I]t's a pattern of not properly assessing her and letting her get bad without recognizing it.[36]

. . .

Q: The deviations of the standard of care that . . . we just went over, is it your opinion that the combination of those caused harm to Ms. O'Donnell?

A: Right. Yes. It's a combination and pattern, not just one day or whatever. It's a repeated pattern of, you know, lack of assessment and doing the preventive steps.

Q: Is it any one licensee or management company's fault?

A: No. . . .

Q: And why do you say that?

A: Because again, a pattern and it started, you know, with her falling. I think that is a key event in December of 2018. And then she really declined after that. And one thing led to another and then losing her dentures and the fall caused her a lot of pain but then in addition to that, she was so much less mobile, very high-risk for pressure ulcers because of her mobility, and then her pain was due to her sacral ulcer. . . So it just was a spiral down because of all that, really starting with that fall in December.

Q: Can you take out any one incident or one injury in a vacuum?

A: Not really, no.

Q: Why do you say that?

A: Because it was a combination of events. Because she kept kind of rallying, you know. Her wounds would get better, she would tell . . . the staff . . . . So it wasn't just one thing. It was that combination effects.

- With respect to care plans "that are supposed to be performed by the staff", "facility fall protocols" that "they" never produced, increased supervision that "they" should have done, and incomplete nursing notes, Nurse Frederick offered the following opinion:

Q: [T]hose deviations that I just brought up again, in your opinion, are they deviations from the standard of care?

A: Absolutely, yes.

Q: And do they increase the risk of harm to Patricia and cause harm?

A: Yes.[37]

ERNEST TOSH

Mr. Tosh testified, without objection from Defendants, as a qualified expert in the area of staffing analysis and cost-reporting analysis for nursing homes. N.T. 1/19/23 at 18. His testimony with

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[35] This testimony does not identify which of the Defendants breached a standard of care. The "they" here, however, clearly refers to the nurses and/or nursing staff at the Facility.

[36] This testimony does not identify which of the Defendants was responsible for causing the increased risk of harm of wound worsening and infection. As noted hereinabove, however, Nurse Frederick's other testimony as to charting and assessment related to responsibilities of the nurses and/or nursing staff at the Facility.

[37] This testimony does not identify which of the Defendants breached a standard of care or caused an increased risk of harm to or otherwise harmed Ms. O'Donnell. As noted hereinabove, however, Nurse Frederick's other testimony concerning these issues related to responsibilities of the nurses and/or nursing staff at the Facility.

respect to the staffing at Brinton Manor during the time period when Ms. O'Donnell was a resident there was the following:

- He performed an analysis of CMS expected staffing during the time when BM-SNF was the operator of the Facility and Vita was managing the Facility, from June 2018 through the end of June 2019. Tosh Dep. at 45-46.
- He performed an analysis of CMS expected staffing from July 1, 2019 through the end of 2019. Tosh Dep. at 47.
- He concluded that, for both of the time periods, the staffing levels at the Facility were below CMS expected staffing levels. Tosh Dep. at 47-48.
- He provided testimony about evidence, including evidence provided by Defendants about their revenue for the Facility, about net patient revenue "under the owners from June of 2018 through the end of June 2019". Tosh Dep. at 48-51.
- He provided testimony about rates paid to staff at the Facility at times when the Facility was owned/operated by the Vita Defendants vs. the Imperial Defendants, and the cost savings that benefited each group of Defendants. Tosh Dep. at 52-57.

DR. SEIGNIOUS

Dr. Seignious testified that he had reviewed medical records and testimony about the care from Ms. O'Donnell's "care providers" in order to determine the cause of death for Ms. O'Donnell. N.T. 1/20/23 at 14-15. He testified about the following specific injuries suffered by Ms. O'Donnell:

- Ms. O'Donnell's December 12, 2018 fall and hip fracture, which Dr. Seignious characterized as "a preventable fall", caused her to suffer a "downhill decline". N.T. 1/20/23 at 15-16.
- Ms. O'Donnell's stage 4 pressure wound, developed in July of 2019, was a preventable or avoidable wound. N.T. 1/20/23 at 16.
- There were no protocols or policies put in place by any of the Defendants relating to repositioning of residents and/or pressure wound prevention and/or follow-up care with respect to the wound from the nursing team. N.T. 1/20/23 at 33.
- The stage 4 pressure wound was a contributing factor to Ms. O'Donnell's death. N.T. 1/20/23 at 17.
- When Ms. O'Donnell was transported from Brinton Manor to Riddle Hospital on July 21, 2019, she was malnourished and dehydrated. N.T. 1/20/23 at 55-56.
- In the days leading up to Ms. O'Donnell's hospitalization, there was no indication that her pressure wound had been assessed at Brinton Manor, that anyone at Brinton Manor was aware that she had a fever or was dehydrated. N.T. 1/20/23 at 56-57.
- The sacral wound Ms. O'Donnell had upon admission to the hospital on July 21, 2019 caused her sepsis. N.T. 1/20/23 at 64.

Dr. Seignious also testified that, if the standard of care with respect to Ms. O'Donnell's pressure ulcer had been met, and had the pressure ulcer not progressed to the level of infection that it did, Ms. O'Donnell would not have died when she did. N.T. 1/20/23 at 85. He opined that Ms. O'Donnell died as a result of sepsis, osteomyelitis, severe protein calorie malnutrition. N.T. 1/20/23 at 93.

The Defendants argue that JNOV is proper (or a new trial is required, see infra) because Plaintiffs elicited testimony from their witnesses who unfairly and misleadingly lumped all Defendants together. Specifically, the Vita Defendants argue that Plaintiffs and their witnesses—fact and expert—conflated the roles of the individual defendants, and note that *Defendants'* witnesses made clear the separate identities and responsibilities (if any) of the separate defendants vis-à-vis Ms. O'Donnell.[38] The Vita Defendants argue further that there was no expert testimony that the wounds Ms. O'Donnell suffered during the time that BM-SNF was the Licensee/Operator caused her death, and that without such causation evidence, the negligence claim against BM-SNF via vicarious liability fail as a matter of law. The Imperial Defendants argue likewise: that Plaintiffs improperly conflated the two theories of liability and the parties, and that the law requires Plaintiffs to establish these claims separately and with respect to each individual defendant-entity.[39] The Imperial Defendants argue further that Plaintiffs did not prove that BM Rehab and Nursing Center is liable under ***vicarious liability theory***. They assert that there was no proof of a relationship between BM Rehab and Nursing and its staff.

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[38] In the absence of any evidence to support a theory of enterprise liability or piercing of the corporate veil, the Vita Defendants assert that there was insufficient evidence linking *Vita* to each of the four elements of Plaintiffs' claim against Vita—i.e., that Vita had a duty vis-à-vis Ms. O'Donnell, that it breached the standard of care, that Vita's breach of a duty caused Ms. O'Donnell to suffer injuries, and that Plaintiffs suffered damages as a result of Vita's actions or inaction—and that, therefore, the jury's finding that Vita was responsible for negligence (and 60% of the compensatory damages) cannot stand, under either the JNOV standard or the standard for a new trial. The Court need not reach this argument in light of its ruling that JNOV is appropriate as to Vita in light of Scampone's limitation and Plaintiffs' clarification at oral argument.

[39] Like the Vita Defendants, the Imperial Defendants argue that Plaintiffs did not prove liability as to Imperial under a ***direct, corporate negligence theory***, *i.e.*, that Imperial owed a duty directly to Ms. O'Donnell, or that Imperial breached any such direct duty. They argue that there is no proof of a direct relationship between Imperial and Ms. O'Donnell, and no expert testimony that established that Imperial owed Ms. O'Donnell a duty. They assert that there is no evidence that Imperial had any responsibility for or role in the day-to-day operations of Brinton Manor; as such, Plaintiffs have not proven a causal relationship between Imperial and the harm suffered by Ms. O'Donnell as a result of any breaches of the standard of care at the facility. Further, the Imperial Defendants argue that Plaintiffs' experts did not offer any testimony as to how Imperial's deviations from certain standards of care caused harm to Ms. O'Donnell. As with the Vita Defendants' similar argument, the Court need not reach this argument in light of its ruling that JNOV is appropriate as to Imperial in light of Scampone's limitation and Plaintiffs' clarification at oral argument

The Imperial Defendants argue further that Plaintiffs did not prove that ***Imperial*** is liable under ***vicarious liability theory***. They argue that, *inter alia*, there is no proof of a relationship between Imperial and any nurses and/or staff who provided care for Ms. O'Donnell. The Court need not reach this argument in light of Plaintiffs' clarification at oral argument that "the management companies were always just corporate negligence or direct negligence [claims]." Oral Arg. at 182-83.

With respect to ***BM Rehab and Nursing Center***, the Imperial Defendants argue that there is no proof that BM Rehab and Nursing Center owed a specific, ***direct*** duty to Ms. O'Donnell, or that it breached such a duty. They contend that none of Plaintiffs' experts identified such a duty and none of them established a causal nexus between BM Rehab and Nursing Center's breaches of a standard of care and Ms. O'Donnell's harm. The Imperial Defendants assert that there is no proof that BM Rehab and Nursing Center had actual or constructive knowledge of any of the defects or procedures that created the harm. Again, in light of Plaintiffs' clarification at oral argument that their claim against the licensees were via vicarious liability, the Court need not reach a conclusion as to whether there was proof of a direct duty between BM Rehab and Nursing Center and Ms. O'Donnell, or whether it breached such a duty.

They contend further that there was no proof by any expert that the conduct of any purported agents fell short of an applicable standard of care or proximately caused harm to Ms. O'Donnell. And they claim that Plaintiffs waived the right to assert that the jury found BM Rehab and Nursing vicariously liable for the conduct of its staff. The Court rejects these arguments.

First, the evidence from Plaintiffs' several experts, taken together, was sufficient to provide a basis for the juries' finding that each Defendant's negligence was a substantial factor in bringing about the harm to Ms. O'Donnell. Where the defendant's negligence is not obvious, a plaintiff must present expert testimony to establish to a reasonable degree of professional certainty that the defendant's acts deviated from an accepted standard of care and that the deviation was a substantial factor in causing harm to the plaintiff. Welsh, 698 A.2d at 585. Sufficient expert testimony is where one or more experts whose testimony (alone or together) support the conclusion that there was a deviation from a standard of care implicated by the defendant's corporate duties and that the deviation was a substantial factor in bringing about the harm. See Welsh, Scampone, Rauch, supra. Moreover, Scampone does not preclude a plaintiffs' experts from opining, as they did in this case, that multiple entity-defendants owed the same duty of care to the resident, or that, altogether, the Defendants' conduct deviated from the duty or duties of care to the resident.

The Defendants' arguments about improper "collectivization" of the Defendants and/or the "lumping together" of the Defendants was also advanced—and expressly rejected—in Dubose v. Quinlan, supra, at 1241-42. As in this case, there was expert testimony about, inter alia, appropriate staffing ratios, quality assurance plans, and the fact that the management company-defendant was receiving a management fee from the operator for the management company's services to the nursing home. There was expert testimony about the failure to adhere to related standards of care to assure that care was being provided to the residents at the facility, and that the plaintiff-resident in that case was harmed (ultimately by dying) as a result of the failure to enforce policies and procedures at the facility and/or to comply with stage regulations and standards pertaining to nursing homes. 125 A.3d at 1241-42. The Dubose Court found that "[t]he Chief Nurse Executive in charge of Willowcrest was placed by [the management company] and knew or should have known that LPNs were preparing skin care assessment forms in violation of state law. In addition, there was evidence of chronic understaffing in violation of [both corporate defendants'] duty to provide the nursing home residents with competent nursing staff." Id. As such, the Dubose Court found that the trial court had properly denied the Defendants' motion for JNOV. The same result is required in this case. Taken together, the Court finds that Plaintiffs' expert opinions sufficiently established that the Defendants owed Ms. O'Donnell one or more duties, breached those duties, and that those breaches caused Ms.

O'Donnell to suffer harm. When viewing the experts' testimony, the testimony of lay witnesses (including those portions excerpted hereinbelow, see infra) and the documentary evidence introduced at trial as further proof of various duties and breaches thereof, and drawing all favorable inferences from all of that evidence, there was a sufficient basis for a jury to have made its findings that Defendants were negligent and that their negligence was the factual cause of Ms. O'Donnell's harm and death.

The Court also rejects Defendants' argument that, with respect to Plaintiffs' negligence claim via vicarious liability, the jury never made a finding as to agency—which agent of which corporate entity was negligent, through whom liability would be imposed vicariously on the relevant defendant. Oral Arg. Tr. at 36-37; 126-44; 179-82; see also Imperial Defendants' Brief at 14-16 & 29 (arguing that Plaintiffs waived a right to claim that the jury verdict found the Imperial Defendants liable for negligence via vicarious liability doctrine). The verdict sheet, to which all parties agreed prior to trial (except as to one point not relevant to this argument), did not include line items for the jury to identify the agent(s) of the corporate defendant(s) through whom liability would be imposed on the corporate entity. Defendants argue that the failure to include such a breakdown on the verdict slip, and the resulting failure by the jury to make a factual finding as to agency and corresponding vicarious liability, precludes Plaintiffs from arguing now that the verdict is one of vicarious liability. They contend that it was Plaintiffs' responsibility, not theirs, to request that the jury make particular findings as to agency. As a result, Defendants argue that the verdict can only be construed as a direct liability verdict.

As noted above, the verdict slip in this case was agreed to by all parties with only one objection unrelated to the issue now raised by the Imperial Defendants. Moreover, the jury was instructed—again without objections from any party—on the law of vicarious liability and agency (among other jury instructions). Plaintiffs note correctly that the general verdict rule precludes Defendants from arguing that a new trial is warranted because of alleged inadequacies in the verdict slip. See Cowher v. Kodali, 283 A.3d 794, 804-07 (Pa. 2022) (rejecting defendants' arguments, finding that under the general verdict rule, "when a litigant fails to request a special verdict slip that would have clarified the basis for a general verdict, and the verdict rests upon valid grounds, 'the right to a new trial is waived'") (internal citations omitted); see also Spencer v. Johnson, 249 A.3d 529 (Pa. Super. Ct. 2021) (same). Moreover, the suggestion that it was Plaintiffs' burden to request the special interrogatory pertaining to agency and vicarious liability was rejected in Spencer, where (like here) the verdict slip in a negligence case, drafted with the consultation of all counsel, posed generalized questions for the jury, and did not contain language requiring the jury to make findings as to agency,

even though vicarious liability was one of the theories the plaintiffs advanced at trial (and with which the jury was charged). Without such findings (via special interrogatories or otherwise), that general verdict (like the one in this case) was ambiguous (by definition, since the plaintiff had proceeded via two theories). However, that ambiguity is construed in favor of the verdict winner:

> [A losing party]'s failure to request a special interrogatory allocating damages based on individual or vicarious liability, despite several opportunities to do so, constitutes waiver. As indicated in Halper and Shiflett, we will not shift the burden based upon [the losing party]'s failure to request a clarifying special interrogatory.

Spencer, 249 A.3d at 556-57 (citing Halper v. Jewish Family & Children's Serv., 963 A.2d 128 (Pa. 2009) & Shiflett v. Lehigh Valley Health Network, Inc., 217 A.3d 225 (Pa. 2019)). Here, as in Cower and Spencer, "there was a general verdict supported by both valid and allegedly invalid grounds, and the party challenging the verdict failed to request a special verdict slip clarifying whether the verdict in fact rested on the claimed improper basis."

Spencer is instructive in another regard. In Spencer, as in this case, the plaintiff proceeded with a negligence claim on theories of direct and vicarious liability. As noted above, the trial court in Spencer erred in adopting the position—the same position advanced by the Defendants in this case—that the verdict slip did not specifically include findings as to agency and vicarious liability. But the trial court in Spencer erred further in concluding that there was insufficient evidence to support a jury finding that the defendant was acting within the course and scope of her employment at the time of the accident and that, therefore, the employer-entity-defendant could not bear vicarious liability for her negligence. The Superior Court disagreed. Noting that "[w]here a corporation is concerned, the ready distinction between direct and vicarious liability is somewhat obscured because we accept the general premise that the corporation acts through its officers, employees, and other agents," Spencer, 249 A.3d at 550 (citing Scampone) (emphasis added), the Spencer Court observed that "[g]enerally, the scope of [an employee's] employment is a fact question for the jury. Where the facts are not in dispute, however, the question of whether . . . the [employee] is within the scope of this [] employment is for the court." Id. (citations omitted) (emphasis added).

In this case, no one can credibly advance the suggestion that the persons on-the-ground at the Facility—whether the nurses, the staff, the administrators, the persons responsible for charting, or the staff responsible for resident care—were not acting within the scope of their employment with the respective Licensee/Operator. Indeed, the abundant documentary evidence and testimony of both fact and expert witnesses establishes beyond peradventure that the tasks performed by the various personnel were typical of the kind of tasks those personnel performed at a nursing home, occurred substantially within the time and space of the persons' activity with respect to the nursing home, and

were performed in furtherance of the persons' responsibilities on behalf of the Licensee/Operator. As to each of the two licensee-operators, the evidence clearly showed that they were the Commonwealth-licensed entities that provided hands-on care through its employees to residents of the Facility. See N.T. 1/18/23 at 110-15. Among other responsibilities, the licensee-operators had to hire sufficient nursing staff, develop staff schedules, and supervise the nursing staff. Abundant evidence from employees and/or former employees of the licensee-operators (including Brinton Manor Director of Nursing Bridget Alvanos, Brinton Manor Unit Manager Ellen DiCarlo[40], and Brinton Manor Nurse Gertrude Mutiwazuka) about, *inter alia*, deficient patient care and the administrator's response to staff shortage issues (for example, offering gift cards to staff in response to getting notice of problems) supported a conclusion that the licensee-operators did not carry out those responsibilities responsibly or sufficiently.[41] These witnesses described duties that the various Defendants assumed and carried out (or did not carry out) with respect to Brinton Manor by virtue of their own conduct, other Facility employees' conduct, and/or certain management agreements. The jury also saw many documents reflecting inaccuracies in patient charting—a function performed by the Licensee/Operators' personnel. Still further, as noted by the Court's summary of Nurse Frederick's testimony, supra, there were abundant activities at the Facility, carried out (or not carried out) by the employees of the Licensee/Operators, that fell below relevant standards of care. See supra. As such, the Court finds that there is more than sufficient evidence for the jury to have reasonably concluded that the employees of BM-SNF and BM Rehab and Nursing were acting in the

[40] DiCarlo's videotaped deposition testimony was introduced into the trial record by Plaintiffs during their case-in-chief, without objection from Defendants. It is attached in full to Plaintiffs' Omnibus Response to Defendants' Post-Trial Motions.

[41] Some of Ms. DiCarlo's testimony, for example, included the following:

- The Brinton Manor Administrator, Ari Stern, was rarely physically present at the Facility—"Ari never came to work. Ari just wouldn't come. We couldn't find him. We'd have to call trying to look for him. He just didn't show up." [DiCarlo Dep. at 14, 23, 27-28]
- When Mr. Stern was not at the Facility, there was no assistant administrator to perform his duties. [DiCarlo Dep. at 23]
- When Stern was physically present at the Facility, he was not "very interested" in running the Facility [DiCarlo Dep. at 13]
- In the absence of an on-site Administrator, the Director of Nursing was running the building alone, doing 100% of the work of the building, including nursing, activities, dietary, maintenance, and laundry. [DiCarlo Dep. at 17-18]
- When presented with issues such as staffing, Stern "would open up his drawer and throw hundred dollar Visa cards at you, just throw them at you. Instead of dealing with the problem." [DiCarlo Dep. at 18]
- During the time period that Vita managed the Facility and BM-SNF was the licensee, nurses quit and the Facility was short-staffed, which impacted resident care. [DiCarlo Dep. at 21, 25, 28-30]
- During the time period that Vita managed the Facility and BM-SNF was the licensee, there were no Vita policies and procedures for nursing. [DiCarlo Dep. at 22]

course and scope of their employment and that, therefore, these entities are vicariously liable for their employees' negligent acts. Accord Spencer, 249 A.3d at 550-54.

The same evidence is also sufficient to show that the Licensee-Operator Defendants had actual or constructive knowledge of the defect or procedures which led to the harm suffered by Ms. O'Donnell. See Thompson, at 708; accord Hall, 54 A.3d at 400 n.10 ("plaintiff must show the managing entity had actual or constructive knowledge of the understaffing and that the understaffing was a substantial factor in bringing about harm") (citing Scampone I)[42]. The evidence at trial reflected that the Licensee/Operator Defendants were in the business of operating and managing nursing homes and provided "standard" services in connection with those nursing homes. The evidence in this case (including but not limited to the testimony of Defendants' corporate designees, Mr. Stern, Ms. Alvanos, Ms. DeCarlo, and Plaintiffs' expert witnesses), like the evidence in the Scampone line of cases, is sufficient to sustain the jury's verdict that each of the Licensee/Operator Defendants was negligent and that such negligence was a substantial factor in causing harm to Ms. O'Donnell. The jury had the opportunity to listen to all of the testimony (including but not limited to the testimony highlighted hereinabove) presented by all parties, including competing expert testimony presented by the parties. The jury heard Plaintiffs' view of what the Defendants undertook and did in order to oversee the safety of the residents at Brinton Manor (including Ms. O'Donnell) and was free to draw its own conclusions. The jury was in the unique position to make credibility determinations pertaining to all of the testimony, and to draw reasonable inferences from the witnesses' testimony and the documents admitted into evidence. It did so and the Court finds that it would be error to enter JNOV or to grant the request for a new trial, see infra, as to the Licensee/Operators of the Facility.

NEW TRIAL

"Weight of the Evidence"

A court has the duty to grant a new trial "when it believes the verdict was against the weight of the evidence and resulted in a miscarriage of justice." Empire Trucking Co. v. Reading Anthracite Coal Co., 71 A.3d 923, 937 (Pa. Super. Ct. 2013). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a difference conclusion. Ruff, supra, at 49. "The role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." Id. The court views all the evidence and does not consider the evidence in a light more or less favorable to a particular party. Lanning v. West,

[42] In Hall, the "managing entity" was the entity that *actually operated* the nursing home in all respects. Claims against other parties allegedly involved were dismissed prior to trial.

803 A.2d 753, 766 (Pa. Super. Ct. 2002). A challenge to the weight of the evidence triggers the discretion of the trial judge, "who possesses only narrow authority to upset a jury verdict." Commonwealth v. Sanchez, 36 A.3d 24, 27 (Pa. 2011).

For the same reasons that the Court finds that the record evidence does not support entry of JNOV with respect to the Licensee/Operator Defendants BM-SNF and BM Rehab and Nursing, the Court finds that the evidence does not support granting a new trial under the above standard. That is, in light of all of the evidence admitted at trial, including but not limited to the record evidence cited hereinabove, the Court cannot conclude that the jury's verdict as to BM-SNF and BM Rehab and Nursing was against the weight of the evidence or that a miscarriage of justice resulted from the jury's verdict as to the Licensee/Operator entities' negligence with respect to the care of Ms. O'Donnell and the resulting harm that befell her.[43]

With respect to damages—particularly the awards of punitive damages—the Defendants also assert that a new trial is appropriate. They advance several arguments on this point. They argue that, absent evidence supporting a direct claim of negligence against the corporate entities, there can be no punitive damages, since the verdict slip expressly linked an award of punitive damages to the "direct" conduct of the Defendants. See Oral Arg. Tr. at 35 & 55. The Vita Defendants argue that, under Hall v. Episcopal Long Term Care and Temple v. Providence Care Center—two nursing home negligence cases like the present one—the Court must find that the jury's award of punitive damages in this case was manifestly excessive and unsupported by the record.[44] They assert that there was no evidence that either of the two Vita Defendants had a subjective appreciation of the risk of harm to which Ms. O'Donnell was exposed, or that either of them acted or failed to act in conscious disregard of that risk. As they argued in connection with other arguments advanced in their Motion, the Vita Defendants assert that their involvement with the facility ended as of June 30, 2019—this is undisputed—and that, as such, evidence about the pressure wound that developed after their involvement and evidence that treatment records were falsified after their involvement cannot support the imposition of any, let alone, a significant award of punitive damages against the Vita Defendants.

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[43] The jury found that Vita was responsible for 60% of the liability for Ms. O'Donnell's injuries and BM-SNF was responsible for 15%. The Vita Defendants contend that this apportionment was against the weight of the evidence because (1) with respect to Vita, there was no evidence that Vita had provided any care to Ms. O'Donnell, had any duty to do so, or violated any standard of care to her, and (2) with respect to BM-SNF, there was no evidence that any care provided by BM-SNF resulted in the pressure ulcer that contributed to Ms. O'Donnell's death—indeed, there could not have been, since it is undisputed that BM-SNF was no longer involved with the facility after June 30, 2019. As such, the Vita Defendants argue that a new trial must be awarded. In light of the Court's ruling with respect to Vita, the Court need not reach this argument.

[44] Whether the awards are manifestly excessive is addressed in connection with Defendants' requests for remittitur. See infra.

The Imperial Defendants argue that Plaintiffs did not prove that they engaged in any conduct with either an evil motive or reckless indifference to the rights of others. They also argue that there is no evidence to sustain the award of punitive damages against them, as they were only involved in the facility for 21 days. See Oral Arg. Tr. at 144. The Imperial Defendants assert that there was no evidence whatsoever that any of the Imperial Defendants knew about Ms. O'Donnell and turned a blind eye to the conditions alleged. Oral Arg. Tr. at 145. The Imperial Defendants argue further that "state of mind" evidence such as surveys or five-star reports that gave rise to notice of these conditions to other defendants cannot be used to establish the state of mind for the Imperial Defendants. Oral Arg. Tr. at 145.

In determining whether the evidence supports a punitive damages award, the Court applies well-settled Pennsylvania law on punitive damages. Namely,

- Punitive damages may be awarded for **conduct that is outrageous because of the *defendant's evil motive or its reckless indifference to the rights of others***. Hutchison v. Luddy, 870 A.2d 766, 770 (Pa. 2005) (internal citations omitted).

- Punitive damages are proper only in cases where the **defendant's actions are so outrageous as to demonstrate *willful, wanton or reckless conduct***. Id. (internal citations omitted).

- The defendant's action, together with all the circumstances including the motive of the wrongdoers and the relations between the parties must be considered. Feld v. Merriam, 485 A.2d 742, 748 (Pa. 1984) (internal citations omitted).

- The state of mind of the actor is vital—the act, or failure to act must be intentional, reckless or malicious. Hutchinson at 770-71 (internal citations omitted). Neither a third party's conduct nor the end result—each of which may well be outrageous—play a role in the analysis; the court must examine the **actor's** conduct. Feld, at 748 (finding court erred in submitting punitive damages to jury because record did not allow jury to conclude that defendant's conduct was outrageous).

- The purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others like him from similar conduct. Hutchinson, 870 A.2d at 770 (internal citations omitted).

- "Reckless indifference" requires evidence that the actor (1) subjectively appreciated the risk of harm to which the plaintiff was exposed and (2) consciously acted (or failed to act) in deliberate disregard of that risk of harm to others. Id. at 771-72 (internal citations omitted).

Scampone again provides guidance with respect to Defendants' arguments concerning whether there was sufficient evidence in this case to support the jury's awards of punitive damages against each Defendant. As noted above, the fact finder may award punitive damages where there is evidence showing that the defendant "acted in an outrageous fashion", which the fact finder has the

discretion to find if there is evidence of either an evil motive or "reckless indifference to the rights of others." Scampone I, 11 A.3d at 991 (internal citations omitted); see also Dubose, supra. In Scampone I, the Court noted that "[t]he record was replete with evidence that the facility was chronically understaffed and complaints from staff continually went unheeded." Id. There was evidence that employees of the operator and management company were aware of the understaffing that was leading to improper patient care. Id. at 991-92. There was evidence of alteration and/or falsification of records. There was evidence of deplorable conditions at the facility and desperation by the plaintiff-resident. Id. With that backdrop, the Scampone Court concluded that both the operator and management company "acted with reckless disregard to the rights of others and created an unreasonable risk of harm to the residents of the nursing home" sufficient to permit the jury to award punitive damages. 11 A.3d at 991.[45]

Similar evidence was found sufficient to be submitted to the jury in Hall v. Episcopal Long Term Care. In that case (cited by the Defendants), the Superior Court concluded that the trial court had erred in failing to submit the issue of punitive damages to the jury because the evidence, if believed by the jury, "would rise to the level of reckless disregard as set forth by Scampone". 54 A.3d at 396-97. Like Scampone, the evidence in Hall was also *similar to the evidence in this case*: chronic understaffing, complaints from staff, awareness by the defendant that there was understaffing, evidence that the plaintiff-resident "continuously cried out in pain", evidence that the staff disregarded the resident's pain, falsified care logs. Hall, at 396-97. The record in this case reflects that each of these (or similar) types of evidence was heard by the jury in our case before it awarded punitive damages against the Defendants.[46] As noted by Plaintiffs, at least the following evidence showed that the Defendants had the requisite subjective appreciation of the harm that was highly probable to befall Ms. O'Donnell:

- The designees of the corporate defendants testified that they knew they were going into a business that provided direct patient care to a vulnerable community dependent on the providers; as such, the Defendants should have known that if they failed to act in accordance with those expectations, there was a high probability that serious harm could result to a nursing home resident. Oral Arg. Tr. at 150 & 152.

[45] In addition, certain Department of Health surveys regarding patient care at the nursing home demonstrated that the Defendants were aware of various dangerous conditions that existed at the nursing home and that they recklessly disregarded their responsibility to correct them. These surveys were relevant to the issue of punitive damages—they "demonstrated the existence of across-the-board substandard care rendered at the nursing home and were relevant to show that the defendants had knowledge of these deficiencies in patient care and blithely ignored them by failing to increase staffing levels." 169 A.3d at 626-27.

[46] Temple v. Providence Care Ctr., LLC, 248 A.3d 464 (Pa. Super. Ct. 2021), another non-precedential case cited by the Defendants, does not *require* this Court to reach a different result.

- The Defendants were aware of the survey history and the five-star ratings for the Facility, putting them on notice of facility-wide problems. Oral Arg. Tr. at 152.

In addition, other evidence in the record supporting Plaintiffs' position on this point is described and referenced in (and attached to) Plaintiffs' Opposition Brief. See Pls.' Br. at 43-48 and the record evidence referenced and attached thereto. This included abundant evidence showing that the Licensee/Operators made a variety of budgeting and hiring decisions that caused high turnover in administrative and nursing positions, which caused a drop in the quality of care for Ms. O'Donnell. The jury also heard evidence about a lack of policies, insufficient nursing staff, insufficient and improper nursing *care*, and the Defendants' hiring of less expensive (but less qualified) staff instead of more expensive and more qualified nursing staff. Still further, the jury heard evidence that the Defendants were aware that the Facility was falling short in various areas, from mock surveys they conducted and complaint surveys about the Facility. [See Stern Dep. at 14, 30-31, 33-34, 45-46.] They also recognized that the star ratings for nursing home facilities were important because they reflected the quality of care required to take care of the residents. [See Silberberg Dep. at 27-280.] Nevertheless, they not only permitted substandard conditions to exist, but ignored problems with staffing instead of solving them. [See DiCarlo Dep. at 13, 18, 21, 25, 28-30.]

The jury evaluated all of the testimony as it was presented, and made credibility determinations within their exclusive discretion. What those determinations were—with respect to, for example, witnesses whose demeanor was cavalier (whether in person or during their videotaped depositions played at trial), witnesses who offered inconsistent testimony, or witnesses whose presence (or absence) at trial supported inferences consistent with the allegations in the case—we cannot know. But such inferences were for the jury, and the jury alone, to draw, and are entirely appropriate. In light of all of the foregoing, the Court must conclude that neither JNOV nor a new trial is appropriate with respect to the jury's award of punitive damages against the Defendants.

Challenged Evidentiary Rulings

With respect to challenged evidentiary rulings, a new trial is warranted when (1) the rulings were in error and (2) that error caused prejudice to the moving party. Harman ex rel. Harman v. Borah, 756 A.2d 1116, 1122 (Pa. 2000). An error in an evidentiary ruling is one where the law was overridden or misapplied, or the court's judgment was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record. Id. at 1123. An error is prejudicial if the Court determines that the ruling could have affected the verdict and/or a new trial would produce a different verdict. Id. at 1122.

The Defendants argue that a new trial is warranted because they assert the Court made certain errors prior to or at trial. As explained below, the Court rejects each such argument.

1. **Dr. Preston Testimony**. The Defendants assert that the Court's ruling on their pre-trial motions in limine concerning the testimony of Delaware County Medical Examiner Bennett Preston, M.D. was in error and that the admission of Dr. Preston's testimony was so prejudicial to the Defendants that a new trial is warranted. Prior to trial, the Defendants objected to the admission of Dr. Preston's testimony on various grounds. See Dkt. Nos. 34 & 36 (Defendants' Motions in Limine to Preclude Testimony of the Medical Examiner, Bennett Preston, M.D.). The parties entered into a Stipulation resolving some of the objections raised with respect to Dr. Preston's testimony and other issues presented in other motions in limine. See Dkt. No. 65. The Court considered Defendants' arguments and Plaintiffs' response thereto (Dkt. No. 63) and the Court resolved those objections in an Order dated January 3, 2023. See Dkt. No. 84. The Court incorporates by reference, as if fully set forth herein, its analysis of Defendants' previously raised arguments pertaining to Dr. Preston and the conclusions it reached. The Court rejected Defendants' arguments for the reasons set forth in that Order and relies on them to reject Defendants' similar post-trial arguments contending that it erred with respect to Dr. Preston's testimony.

Moreover, the parties were provided opportunities prior to trial to raise objections to proposed videotaped testimony, and did so with respect to some witnesses, including Dr. Preston. See Dkt. No. 74 (Defendants' Objections to Videotaped Depositions and Counter-designations). Those objections (pertaining to Dr. Preston), however, were withdrawn (by letter to the Court) in light of the Court's separate ruling on the motions in limine related to Dr. Preston. At trial, Dr. Preston's testimony was presented in its entirety via videotaped deposition testimony without objection by the Defendants. See N.T. 1/20/23 at 156-217. That is, not only did Defendants expressly state that they had no objection with respect to the qualification of Dr. Preston as an expert in forensic pathology, see N.T. 1/20/23 at 164, but they did not renew the objections they had made in their pre-trial motions in limine with respect to the substance of Dr. Preston's testimony.

For all of the foregoing reasons (including but not limited to the reasons from the Court's prior Order, incorporated by reference), the admission of Dr. Preston's testimony at trial was neither erroneous nor so prejudicial as to constitute grounds for a new trial.

2. **DOH Survey Reports**. The Defendants assert that the Court's ruling on their pre-trial motion in limine concerning certain Pennsylvania Department of Health Survey Reports ("DOH Survey Report Evidence") was in error and that the admission of that evidence at trial was so prejudicial to the Defendants that a new trial is warranted. Prior to trial, the Defendants objected to the admission of

the DOH Survey Report Evidence on various grounds. See Dkt. No. 37 (Defendants' Motion in Limine to Preclude Evidence about Pennsylvania Department of Health Survey Reports). The Court considered Defendants' arguments and Plaintiffs' response thereto (Dkt. No. 60) and the Court resolved those objections in an Order dated January 3, 2023. See Dkt. No. 85. The Court incorporates by reference, as if fully set forth herein, its analysis of Defendants' previously raised arguments pertaining to the DOH Survey Report Evidence and the conclusions it reached. The Court rejected Defendants' arguments for the reasons set forth in that Order and relies on them to reject Defendants' similar post-trial arguments contending that it erred with respect to the DOH Survey Report Evidence.[47]

Moreover, at trial, Defendants did not object to extensive testimony from various witnesses about the DOH survey reports. See N.T. 1/18/23 at 97-98, 133, 143-47, 164; N.T. 1/23 at 10, 14-15, 27-31, 38-44. Indeed, by agreement of all counsel, a limiting instruction pertaining to one such survey was read to the jury. Moreover, Defendants themselves elicited testimony during their case with respect to the DOH survey reports. See N.T. 1/23/23 at 228-29, 288-89, 300-02; N.T. 1/24 at 10. At the close of Plaintiffs' case when Plaintiffs' were moving the exhibits they had used into evidence, Defendants objected to the admission of Exhibits P-16, P-17, and P-18 on the same grounds as previously asserted in their pre-trial motion in limine concerning the DOH Survey Reports. See N.T. 1/23/23 at 79. These three (3) exhibits were the only documents containing DOH Survey Report Evidence introduced by Plaintiffs at trial, and they related to issues relevant to the care of Ms. O'Donnell. See Oral Arg. Tr. at 109-11. The Court overruled Defendants' objections related to those exhibits for the reasons set forth in its January 3 Order resolving the motion concerning the DOH Survey Report Evidence.

For all of the foregoing reasons (including but not limited to the reasons from the Court's prior Order, incorporated by reference), the admission of the DOH Survey Report Evidence at trial was neither erroneous nor so prejudicial as to constitute grounds for a new trial.

3. "Nursing Home Compare" Profile. The Defendants assert that the Court's ruling on their pre-trial motion in limine concerning a certain "Nursing Home Compare" Five-Star Rating Profile (the "Profile Evidence") was in error and that the admission of that evidence at trial was so prejudicial to

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[47] The Court notes that *Plaintiffs* also filed a pre-trial motion in limine concerning Pennsylvania Department of Health Surveys and related "Deficiencies", requesting that the Court preclude testimony or evidence that DOH did not issue a "Deficiency" to the Facility during the time of Ms. O'Donnell's residency. See Dkt. No. 45. The Court denied Plaintiffs' Motion, thus permitting Defendants to highlight at trial that the DOH Survey Reports did not result in "Deficiencies" being issued to the Facility. See Dkt. No. 79. As such, any prejudice resulting from Plaintiffs' ability to introduce DOH Survey Report Evidence was balanced by Defendants' ability to counter such evidence.

the Defendants that a new trial is warranted. Prior to trial, the Defendants objected to the admission of the facility's "Nursing Home Compare" Five-Star Rating Profile on various grounds. See Dkt. No. 40 (Defendants' Motion in Limine to Preclude Evidence about Brinton Manor's "Nursing Home Compare" Five-Star Rating Profile). The Court considered Defendants' arguments and Plaintiffs' response thereto (Dkt. No. 58) and the Court resolved those objections in an Order dated January 3, 2023. See Dkt. No. 86. The Court incorporates by reference, as if fully set forth herein, its analysis of Defendants' previously raised arguments pertaining to the Profile Evidence and the conclusions it reached. The Court rejected Defendants' similar arguments for the reasons set forth in that Order and relies on them to reject Defendants' post-trial argument contending that it erred with respect to the Profile Evidence.

Moreover, at trial, Defendants raised no objection to testimony about the Profile Evidence, see N.T. 1/23/23 at 10-11, which testimony was elicited both during Plaintiffs' case-in-chief, see id., and during Defendants' case. See N.T. 1/23/23 at 287-88. Further, at the close of Plaintiffs' case when Plaintiffs were moving the exhibits they had used into evidence, Defendants raised no objection to any documents containing Profile Evidence. See N.T. 1/23/23 at 78-79.

For all of the foregoing reasons (including but not limited to the reasons from the Court's prior Order, incorporated by reference), the admission of the Profile Evidence at trial was neither erroneous nor so prejudicial as to constitute grounds for a new trial.

4. **Inflammatory Comments**. The Defendants assert that the Court's ruling on their pre-trial motion in limine concerning certain "inflammatory statements" was in error and that permitting Plaintiffs to make "inflammatory" comments, statements, and/or arguments at trial was so prejudicial to the Defendants that a new trial is warranted. Prior to trial, the Defendants sought an Order from the Court prohibiting Plaintiffs from making "any inflammatory comments, statements or arguments at trial". See Dkt. No. 32 (Defendants' Motion in Limine to Preclude Plaintiffs from Making Improper Appeals to Juror Sympathy and from Making Inflammatory Comments at Trial). The Court considered Defendants' arguments and Plaintiffs' response thereto (Dkt. No. 62) and the Court resolved those objections in an Order dated January 3, 2023. See Dkt. No. 83. Importantly, the Court GRANTED IN PART Defendants' pre-trial motion in limine on this issue. See id. Presumably Defendants contend that the Court erred in ruling on that motion in limine only to the extent that it denied their motion.

The Court incorporates by reference, as if fully set forth herein, its analysis of Defendants' previously raised arguments and the conclusions it reached, and relies on them to reject Defendants' similar post-trial arguments contending that it erred with respect to that motion in limine. The Court recognizes that, during Plaintiffs' closing argument, counsel used the words "torture" with respect to

food provided to Ms. O'Donnell at the Facility, and the phrase "torture camp" with respect to the pain Ms. O'Donnell experienced as a result of certain wounds. See N.T. 1/25/23 at 29 & 36. Defendants raised no objections to these words at the time of the argument. There is nothing to suggest to the Court that these two utterances during closing argument caused the jury to evaluate the evidence in an improper way. Indeed, the Court advised the jury at various stages of the trial that the arguments of counsel were not evidence.

For all of the foregoing reasons (including but not limited to the reasons from the Court's prior Order, incorporated by reference), permitting allegedly "inflammatory" comments, statements and/or arguments was neither erroneous nor so prejudicial as to constitute grounds for a new trial.

5. Verdict Sheet. Defendants advanced an argument in their Motion that a new trial was required because of error related to Defendants' proposed verdict sheet. This argument was withdrawn at the time of oral argument. See Oral Arg. Tr. at 105. Moreover, the Court observes again, see also supra, that the parties agreed on the verdict sheet that was provided to the jury with the sole objection, from Defendants, that they "believe[d] that there should be separate—broken out into two separate questions—[the compensatory damages, if any], one as for the Survival Act claim and one for wrongful death." N.T. 1/23/23 at 152. As such, the verdict sheet-related argument raised by Defendants in their post-trial Motions lacks merit and is not grounds for a new trial.

Challenged Jury Instruction

With respect to a challenged jury instruction, a new trial is warranted when the jury charge is inadequate, unclear, or had a tendency to mislead or confuse the jury "rather than clarify a material issue." Grove v. Port Auth. of Allegheny Cty., 218 A.3d 877, 887-88 (Pa. 2019).

The Vita Defendants argue that there must be a new trial because Plaintiffs' expert's testimony was insufficient under Bradley v. Thomas Jefferson Health System, 2018 WL 3434298 (Pa. Super. Ct. 2018), to warrant an "increased risk of harm" charge because "the purported causal chain . . . was so convoluted and far-fetched that it was impossible for the jury to find that a fall in December 2017 increased the risk of death via septic shock for Ms. O'Donnell." Vita Ds.' Br. at 32. Similarly, the Imperial Defendants argue that the Court's issuance of the "increased risk of harm" jury instruction—section B of the standard jury instruction for Medical Malpractice--Factual Cause (14.20)—was in error. Defendants objected to that charge at the time of trial, see N.T. 1/24/23 at 149-51, and argue presently that so charging the jury reduced the Plaintiffs' burden of proof and therefore caused Defendants to suffer severe prejudice, requiring a new trial. Defendants argue further that the evidence in this case was insufficient under Hamil v. Bashline and Mitzelfelt v. Kamrin, infra, to justify an "increased risk of harm" instruction. That is, they say that Plaintiffs' experts must have testified—

but did not—that the Defendants' negligence could have caused the type of harm suffered, AND the negligence could have caused the type of harm suffered. In cases of death, "the increased risk of harm standard permits a case to proceed where there was any substantial possibility of survival and the defendant destroyed it." See Hamil, infra. Defendants argue that there was no evidence from Plaintiffs' experts linking Defendants' negligence to Ms. O'Donnell's death and that, as such, the instruction was inappropriate.

As the Superior Court in Klein v. Aronchick reiterated, "[a] plaintiff is entitled to an instruction on increased risk where there is competent medical testimony that a defendant's conduct at least increased the risk that the harm sustained by the plaintiff would occur." 85 A.3d 487, 495 (Pa. Super. Ct. 2014) (internal citations omitted) (finding that trial court had erred in not giving increased risk of harm instruction). The Court in Klein noted the "seminal case on increased risk of harm" cited by the Defendants in this case—Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978) in which the Pennsylvania Supreme Court established a two-part test for when the increased risk of harm instruction is appropriate: (1) where a plaintiff's experts testify to a reasonable degree of medical certainty **that the acts or omissions complained of could cause the type of harm the plaintiff suffered**, and (2) whether the plaintiffs' experts testify to a to a reasonable degree of medical certainly that **the defendants' acts or omissions could have caused the harm actually sustained by the plaintiff**. See Klein, at 492-93 (internal citations omitted). Once the experts render these opinions, it becomes "a question for the jury whether they believed it caused the harm". Id. at 493 (internal citation omitted). Accord Mitzelfelt v. Kamrin, 584 A.2d 888 (Pa. 1990) (finding there was sufficient evidence to allow jury to decide that the standard of care deviated from good and acceptable medical practice, such deviation increased risk of harm to patient, and such harm was actually suffered); Vogelsberger v. Magee-Womens Hosp. of UPMC Health Sys., 903 A.2d 540 (Pa. Super. Ct. 2006) (concluding that plaintiff had presented sufficient facts from which jury could conclude that hospital's deviations from the standard of care increased the risk of harm to Plaintiff, thereby providing basis upon which question of causation was properly submitted to jury). Indeed, the Court in Mitzelfelt "re-emphasiz[ed] a well established principle" from Hamil—namely, that "[o[nce there is sufficient testimony to establish that (1) the physician failed to exercise reasonable care, . . . (2) such failure increased the risk of physical harm to the plaintiff, and (3) such harm did in fact occur, then it is a question properly left to the jury to decide whether the acts or omissions were the proximate cause of the injury." Mitzelfelt, 584 at 894-95 (internal citations omitted); see also Hamil, 392 A.2d at 1286-88 (holding that once a plaintiff demonstrates that defendant's acts or omissions have increased the risk of harm to a person in plaintiff's position, and that such harm was in fact sustained by the plaintiff, "such evidence

furnishes a basis for the fact-finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm; the necessary proximate cause will have been made out if the jury sees fit to find cause in fact").

In this case, the Court finds that the testimony of Plaintiffs' experts, as highlighted hereinabove, satisfied the test(s) established by Hamil and its progeny. The type of harm suffered by Ms. O'Donnell was, in reality, a series of harms leading up to the ultimate harm—her death. Plaintiffs' experts opined that the Defendants and/or their staff breached standards of care with respect to, for example, turning and repositioning of patients, that caused Ms. O'Donnell to suffer harm in the form of, inter alia, bedsores that caused her death. See Nurse Frederick testimony, cited supra. Nurse Frederick also testified expressly that the Defendants' acts and omissions pertaining to the charting—pre-charting, false charting—and their failure to assess Ms. O'Donnell increased the risk of harm that her wounds would worsen and get infected, and that those acts or omissions in fact did actually cause Ms. O'Donnell's wound infections to worsen: "[I]t's a pattern of not properly assessing her and letting her get bad without recognizing it." See id. Nurse Frederick explained the "pattern" of negligence that led at first to Ms. O'Donnell's fall in December 2018, continued with a loss of her dentures and the development of pressure ulcers that, in the end, resulted in her hospitalization and death. Dr. Seignious testified similarly—that Ms. O'Donnell's December 2018 fall and hip fracture ("a preventable fall") caused Ms. O'Donnell to suffer a "downhill decline", leading ultimately to the development of a stage 4 pressure wound (a preventable or avoidable wound) which was a contributing factor to Ms. O'Donnell's death. See Dr. Seignious testimony, cited supra. He also testified that Defendants had no protocols or policies relating to repositioning of patients and/or pressure wound prevention, and he opined that if the standard of care in that regard had been met, and had Ms. O'Donnell's pressure ulcer not progressed to the level of infection it did, she would not have died when she did. All together, the Court finds that the expert testimony here, like that in Klein, Hamil, Mitzelfelt, and Vogelsberger, presented sufficient facts for a jury to be given the increased risk of harm instruction and for it to conclude—as it did—that the increased risk of harm was a substantial factor in bringing about the harm(s) suffered by Ms. O'Donnell.[48] As such, the issuance of this jury

[48] Nothing in the expressly non-precedential decision in Bradley v. Thomas Jefferson Health System, 2018 WL 3434298 (Pa. Super. Ct. 2018), which the Vita Defendants urge the Court to follow, requires a different conclusion. In addition to being non-precedential, Bradley was an appeal form an order granting summary judgment; it did not involve the issue presented here—whether the evidence at trial supported an increased risk of harm jury instruction. Moreover, from the Court's opinion in Bradley, it appears that the plaintiff's expert made only a "passing reference" to the "downward spiral" that the plaintiff suffered, and such "passing reference" was insufficient to raise a genuine issue of fact for the jury to decide with respect to causation. The trial testimony of Plaintiffs' experts in this case constitute, in this Court's view, meaningfully more than a "passing reference" in the Bradley expert report. As such, Bradley is completely unavailing.

instruction was neither erroneous nor grounds for a new trial; it was also not inadequate or unclear, nor was there anything misleading or confusing about the charge. See Grove, supra.

REMITTITUR

Remittitur may be granted where the court, in its discretion, determines that the verdict is so excessive that it shocks the court's sense of justice. Renna v. Schadt, 64 A.3d 658, 671 (Pa. Super. Ct. 2013). "A remittitur should fix the *highest amount any jury could properly award*, giving due weight to all the evidence offered." Neal v. Bavarian Motors, Inc., 882 A.2d 1022 (Pa. Super. Ct. 2005) (internal citation omitted) (emphasis added). The law is well-settled that judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant. Dubose, supra; see also Renna, 64 A.3d at 671 (affirming denial of request for remittitur, affirming underlying judgment of $443,418.09 against defendant doctor) (internal citations omitted). "The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption." Id. (internal citations omitted). Factors some courts consider in reaching this determination in personal injury cases include, but are not limited to, the severity of the injury, whether the injury is demonstrated by physical evidence or subjective testimony, and whether the injury is permanent. Kemp v. Philadelphia Transp. Co., 361 A.2d 362 (Pa. Super. Ct. 1976) ($15,000 verdict in slip and fall case reduced by Superior Court to $10,000). The large size of a verdict is in itself not evidence of excessiveness. See Dubose, supra (where there is evidence that a nursing home resident arrived at the facility with pre-existing injuries but developed festering bedsores that led to her demise, and there was evidence that she suffered from other forms of neglect during her residency, a jury has discretion to award $1.25M in compensatory damages based on their perception of the evidence, noting that "matters of credibility are for the jury, and they are free to believe all, part, or none of the evidence presented").

The amount of pain and suffering damages is primarily a jury question. Renna, 64 A.3d at 671-72 (internal citation omitted) (affirming finding that evidence sufficient to support jury's award of past and future noneconomic damages); cf. Bailets v. Pennsylvania Turnpike Comm'n, 181 A.3d 324, 336) (affirming $3.2 million verdict in action under Whistleblower Law, for non-economic damages in form of mental anguish and other incalculable losses, noting expressly that non-economic damages may consist of inferences that the factfinder draws). Translating pain and suffering into monetary figures is also a "highly subjective task." Haines v. Raven Arms, 640 A.2d 367, 370 (Pa. 1994).

Defendants assert that both the compensatory damages awards and punitive damages awards must be reduced. The Vita Defendants argue that the compensatory damages awards were

excessive and must be reduced because the size of the verdict affects the availability or access to health care in the community served by the provider if it is required to satisfy the verdict. The Vita Defendants also argue the verdict bears no relationship to Plaintiffs' (zero) out-of-pocket expenses in this case. They argue that the punitive damages amounts are unconstitutional under federal constitutional principles and Pennsylvania state law, asserting that, at a minimum, the awards must be reduced. See Oral Arg. Tr. at 145-46, 148-49. The Imperial Defendants also request that the Court remit the jury verdict or, in the alternative, grant a new trial on compensatory damages, arguing that the award was excessive in amount and beyond what the evidence warranted. They also assert that the damages were punitive, will have an adverse effect on the availability of healthcare in the community, and is not in line with verdicts in other cases.

The trial court—the fact-finding jury and the presiding court on post-trial motions—has observed the demeanor of the witnesses and, having done so, the trial court has the "sound and peculiar discretion" to determine whether to disturb the jury award. See Botek v. Mine Safety Appliance Corp., 611 A.2d 1176, 1176 (Pa. 1992) (multiple internal citations omitted) (holding that Superior Court erred in granting remittitur after trial court jury awarded substantial damages to plaintiff, finding that doing so "was an erroneous usurpation of the primary function of the jury and the trial court"); accord Bailets, 181 A.3d at 336 ("The assessment of damages is peculiarly within the province of the factfinder"); Herb v. Hallowell, 154 A.582, 587 (Pa. 1931) (affirming plaintiffs' judgment, observing that trial judge has had opportunity to see witnesses and hear testimony, and is in best position to determine whether verdict was excessive); see also Gillingham v. Consol. Energy, Inc., 51 A.3d 841 (Pa. Super. Ct. 2012) (affirming trial court's ruling that remittitur was not appropriate, noting jury's prerogative to make credibility determinations, affirming judgment for plaintiffs, including awards of more than $1.8 million and more than $4.5 million in connection with injuries sustained after falls from thirteen-foot-high stairs)

The jury in this case was instructed on the applicable law governing awards of compensatory and punitive damages. All parties agreed to those instructions. Pennsylvania law does not permit counsel to suggest appropriate damage awards particular to the case—that determination is left to the jury, which has great discretion to award noneconomic damages based on their experience, intuition, and common sense. Whether Plaintiffs introduced evidence of out-of-pocket expenses is of no moment in determining whether the compensatory damage award for noneconomic damages should be changed. See Martin v. Soblotney, 466 A.2d 1022 (Pa. 1983) (plaintiff's medical expenditures "clearly irrelevant" to determination of pain and suffering). There is nothing in the record to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption; absent such

evidence, the verdict does not "shock the sense of justice". Instead, the record is replete with evidence supporting a finding that the compensatory damages award "falls within the uncertain limits of fair and reasonable compensation." This evidence included extensive testimony, documents, and photographs about Ms. O'Donnell's injuries—her multiple pressure wounds, the painful treatment thereof, her loss of ability to enjoy the pleasures of life, her emotional and psychological decline, her excruciating pain, physical manifestations of embarrassment and humiliation. See, e.g., extensive record evidence cited in Pls.' Br. at 84-88. There was also evidence from multiple witnesses about Plaintiffs' loss as a result of Ms. O'Donnell's injuries and death. See, e.g., extensive record evidence cited in Pls.' Br. at 88-90. The jury in this case thoughtfully considered all of the evidence over the course of many long trial days and during lengthy deliberations. Their awards of compensatory damages for Plaintiffs' non-economic damages under the Survival Act and the non-economic damages under the Wrongful Death Act are neither plainly excessive nor exorbitant and, as such, do not justify remittitur. Cf. Potochnick v. Perry, 861 A.2d 277 (Pa. Super. Ct. 2004) (affirming trial court's determination that remittitur, which "should be applied in narrow circumstances", was not appropriate where a jury was free to believe or not believe the evidence presented at trial; $5 million verdict for injured motorist and $1 million verdict on loss of consortium claim upheld); accord Botek, Renna, supra.

Turning to the amount of punitive damages awards: Under Pennsylvania law, the "size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant". Hollock v. Erie Ins. Exchange, 842 A.2d 409, 418 (internal citation omitted) (affirming punitive damages award in bad faith claim against insurer). Measuring the appropriateness of a punitive damages award requires analysis of (1) the character of the act, (2) the nature and extent of the harm, and (3) the wealth of the defendant. Id. (internal citation omitted). With respect to the constitutional challenges to the punitive damages awards, under BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), a court must evaluate whether a punitive damages award is "grossly excessive" under three factors: (1) the degree of reprehensibility of the defendant's conduct, (2) the relationship of the punitive verdict to the harm suffered, and (3) the difference between the punitive damages awarded by the jury and the civil penalties imposed in comparable cases for comparable misconduct. Campbell, 538 U.S. at 418 (citing Gore); accord DeLuca Co. v. Toll Naval Assocs., 56 A.3d 402, 417 (Pa. Super. Ct. 2012) (citing Pestco, Inc. v. Associated Prods., Inc., 880 A.2d 700 (Pa. Super. Ct. 2005)) (DeLuca is contract case where court *rejected* argument that punitive damages award violated constitutional limitations). Of these, the most important concern in evaluating reasonableness of a

punitive damages award is the first. Campbell, 538 U.S. at 419 (internal citation omitted). In determining the reprehensibility of a defendant, courts consider

- Whether the harm caused was physical as opposed to economic;
- Whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
- Whether the target of the conduct had financial vulnerability;
- Whether the conduct involved repeated actions or was an isolated incident; and
- Whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Campbell, 538 U.S. at 419 (internal citations omitted).

Defendants argue that the punitive damages awards were manifestly excessive. As noted above, the Vita Defendants assert that there was no evidence that either of the two Vita Defendants had a subjective appreciation of the risk of harm to which Ms. O'Donnell was exposed, or that either of them acted or failed to act in conscious disregard of that risk. Moreover, they assert that their involvement with the Facility ended as of June 30, 2019—this is undisputed—and that, as such, evidence about the pressure wound that developed after their involvement and evidence that treatment records were falsified after their involvement cannot support the imposition of any, let alone, a significant award of punitive damages against the Vita Defendants.

With respect to the Vita Licensee/Operator (BM-SNF), the Court has rejected those arguments in finding that the imposition of punitive damages was fully supported by the trial record. See supra. With respect to the amount of the punitive damages award against BM-SNF—$5,000,000—the Court finds that it should not disturb the jury's award under the applicable standards and factors identified hereinabove. That is, the character of the act and/or degree of reprehensibility here—neglect of a vulnerable, completely dependent nursing home resident and a failure to adhere to applicable standards of care—supports punitive damages. The harm caused was physical, not economic. The tortious conduct evinced an indifference to or reckless disregard of the health and safety of others. The conduct at issue involved a series of repeated actions that, as summarized by Plaintiffs' standard of care expert, was "a combination and pattern, not just one day . . . a repeated pattern of . . . lack of assessments and doing the preventive steps"—a "one thing led to another" scenario, also described as a "spiral down" beginning in December 2018 until Ms. O'Donnell died in July 2019. To the same end, the nature and extent of the harm—prolonged pain and suffering, leading to death—as evidenced by extensive testimony, documents, and expert testimony, supports punitive damages. The jury was presented with evidence (including documentary and testimonial evidence, including but not limited to the expert testimony of Mr. Tosh) of the profits earned by BM-SNF thanks to the cost-

cutting measures taken by the Licensee/Operators in their business activities, to the detriment of patient care.

Finally, the amount of the punitive damages award comports with the Pennsylvania Supreme Court's most recent pronouncement on the "appropriate ratio calculation measuring the relationship between the amount of punitive damages awarded against multiple defendants who are joint tortfeasors and the compensatory damages awarded." Bert Company v. Turk, 298 A.3d 44, 48 (Pa. 2023). In Bert, the Supreme Court declared that the "per-defendant" approach is consistent with federal constitutional principles. Notably, the Bert Court also concluded that it was appropriate to consider the harm from the concerted conduct of the defendants in determining whether the measure of punishment was reasonable and proportionate. 298 A.3d at 49. In this case, in which, according to Plaintiffs' experts, the Defendants' conduct all tohgether caused Ms. O'Donnell to suffer a series of harms and, eventually death (as a result of a variety of breaches of standard of care), the jury awarded $4 million in compensatory damages. The ratio of that award to the punitive damages awards against the four defendants, individually, withstands scrutiny under Bert, in which the Court upheld punitive damages awards that were in the range of 1.81 to 6 times the amount of the compensatory damages award (using a per-defendant approach) in a case that did *not* involve evidence of extensive pain and suffering and death of an elderly nursing home resident at the hands of Licensee/Operators who, according to the evidence adduced at trial, were found to have been not only negligent but indifferent to the health and safety of the plaintiff-resident. Thus, the Court finds that the amount of the punitive damages award as to BM-SNF withstands scrutiny under Pennsylvania law and federal constitutional principles.

With respect to the Imperial Defendants, the Court arrives at a different conclusion. Although as discussed above, the Court has concluded that the record supported an award of punitive damages against the Imperial Defendant licensee-operator BM Rehab and Nursing, the Court finds that the $2,000,000 punitive damages award against an entity that was only involved in the Facility for 21 days is grossly excessive and exorbitant and shocks the Court's sense of justice. Because the evidence at trial established a continuing pattern of neglect vis-à-vis Ms. O'Donnell by both Licensee/Operators, and since the Court hereby upholds the jury's punitive damages award of $5,000,000 against the Licensee/Operator that operated the Facility for 13 months of the time Ms. O'Donnell was a resident there, see supra, the Court finds that a "pro-rata" punitive damages award against BM Rehab and Nursing, for the approximately one month of Ms. O'Donnell's residency at the Facility, is the more appropriate highest amount the jury could properly award under the circumstances.

In light of the foregoing, Defendants' Motions are **GRANTED IN PART AND DENIED IN PART** as follows:

1. Defendants' Motions for a New Trial are **DENIED**.
2. The Motions for JNOV of Defendants Vita Healthcare Group and Imperial Healthcare Group, LLC are **GRANTED**.
3. Defendants' Motions for Remittitur are **GRANTED AND DENIED** as follows:
    a. The Motions for Remittitur as to the compensatory damages awards are **DENIED**.
    b. The Motion for Remittitur as to the punitive damages award against Defendant Brinton Manor Center SNF LLC is **DENIED**.
    c. The Motion for Remittitur as to the punitive damages award against Defendant BM Rehab and Nursing Center, LLC is **GRANTED** and the punitive damages award is remitted to $385,000.

BY THE COURT:

KELLY D. ECKEL, J.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

BEVIN NEWLIN and STACEY LOEHRS, as Co-Administratrices of the Estate of PATRICIA O'DONNELL, deceased,	:	
Plaintiffs	:	**CV-2020-008216**
v.	:	
VITA HEALTHCARE GROUP; BRINTON MANOR CENTER SNF LLC f/d/b/a BRINTON MANOR NURSING AND REHABILITATION CENTER; IMPERIAL HEALTHCARE GROUP, LLC; BM REHAB AND NURSING CENTER, LLC d/b/a BRINTON MANOR NURSING AND REHABILITATION CENTER	:	
Defendants	:	

AMENDED FINAL PAGE OF ORDER AND MEMORANDUM ON DEFENDANTS' MOTIONS FOR POST-TRIAL RELIEF

AND NOW, this 20th day of December, 2023, the Court amends the enumerated portions of the final page of its Order and Memorandum on Defendants' Motions for Post-Trial Relief, dated December 20, 2023, as follows:

1. Defendants' Motions for a New Trial are **DENIED**.
2. The Motions for JNOV of Defendants Vita Healthcare Group and Imperial Healthcare Group, LLC are **GRANTED**.
3. The Motions for JNOV of Defendants Brinton Manor Center SNF LLC f/d/b/a Brinton Manor Nursing and Rehabilitation Center and BM Rehab and Nursing Center LLC d b/a Brinton Manor Nursing and Rehabilitation Center are **DENIED**.
4. Defendants' Motions for Remittitur are **GRANTED AND DENIED** as follows:
    a. The Motions for Remittitur as to the compensatory damages awards are **DENIED**.
    b. The Motion for Remittitur as to the punitive damages award against Defendant Brinton Manor Center SNF LLC is **DENIED**.
    c. The Motion for Remittitur as to the punitive damages award against Defendant BM Rehab and Nursing Center, LLC is **GRANTED** and the punitive damages award is remitted to $385,000.

BY THE COURT:

KELLY D. ECKEL, J.