



Nursing Home Appeals \$90 Million Jury Award

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On March 5, 2014, the West Virginia Supreme Court heard oral argument in an appeal of a \$90 million jury award in a case involving the death of a nursing home resident. The appeal stems from a 2011 trial in which the jury found that the Heartland of Charleston nursing home failed to adequately care for an 87-year-old resident, Dorothy Douglas.

Factual Background

Tom Douglas, the son of the former resident, individually and on behalf of the Estate of Dorothy Douglas sued the Health Care and Retirement Corporation of America, LLC, the entity holding the license for Heartland of Charleston and related entities. The suit alleged that the care provided to Ms. Douglas was inadequate and that, among other things, she “died from severe dehydration because she had not been given enough water.”¹ Significantly, the official death certificate lists the cause of death as “dementia,” not dehydration.²

The plaintiffs sued pursuant to the West Virginia Medical Professional Liability Act (MPLA), which caps noneconomic damages at \$500,000. The plaintiffs also alleged a breach of fiduciary duty; ordinary negligence; and a breach of the West Virginia Nursing Home Act (NHA). After a two-week trial, the jury awarded the plaintiffs \$1.5 million for a violation of the NHA; \$5 million to Tom Douglas and Carolyn A. Douglas Hoy (Dorothy Douglas’ daughter, who was not a party); \$5 million to the Estate of Dorothy Douglas based on breach of fiduciary duty; and \$80 million in punitive damages. The \$91.5 million award was reduced to \$90 million by the trial judge, who noted that a small portion of the award should be limited by the medical malpractice cap. The judge also denied a motion for a new trial.

As noted above, West Virginia’s MPLA limits a plaintiff’s recovery in a medical malpractice claim to \$500,000 for noneconomic damages. The jury in this case apportioned the nursing facility’s fault at 80 percent in *ordinary negligence* and 20 percent in medical negligence. Ordinary negligence is not limited by the MPLA’s \$500,000 cap. If the West Virginia Supreme Court finds that the MPLA cap applies and is the exclusive remedy, it could theoretically reduce the \$90 million award to \$500,000. A key question for the Court is whether the failure to provide care in a nursing facility is ordinary negligence or medical negligence. If it is the latter, the cap applies.

According to Daniel S. Foster, M.D., and a member of the West Virginia legislature at the time the MPLA was passed, “The intent of the legislation was to limit the noneconomic damages for a hospital or a nursing home to \$500,000 in a medical malpractice or medical negligence case.” Dr. Foster notes that, “If the \$90 million jury award is allowed to stand, it would have a devastating impact on the nursing home industry in West Virginia.”³

Apart from the issue of whether the \$500,000 cap applies, the Court must decide other challenged aspects of the trial court’s holding. For example, the defendant argues on appeal that it was improper to allow the jury to consider the wealth of HRC Manor Care, Inc., the corporate owner

¹ Respondent’s Brief at 1, *Manor Care, Inc. et al v Tom Douglas, Individually and on behalf of the Estate of Dorothy Douglas*, Supreme Court of West Virginia, Docket No. 13-0470. September 26, 2013.

² Copy of Death Certificate on file with author.

³ Email from Daniel S. Foster, M.D. (formerly Senator Foster (D), member of West Virginia Senate, 2004 -2014) to Alan C. Horowitz (March 20, 2014)(on file with author).

of Heartland of Charleston. During the trial, the plaintiff's attorney argued that "[t]here's a lot of money to be made in healthcare. Manor Care, Incorporated, for one year, in 2009, earned \$4 billion dollars [and had] \$7.9 billion dollars in assets."⁴ Plaintiff's counsel turned to the jury and said, "How are you going to get the Board of Directors attention? For a \$4 billion dollar revenue for one year. What will get their attention so there will be no more Ms. Douglas's ever again?"⁵ Counsel asked the jury to "send a message" to the defendants, and the jury complied.

In addition to considering Manor Care's wealth, other judicial errors were asserted on appeal. The defendants argued that the breach of fiduciary duty and NHA claims are improper since the MPLA is the exclusive remedy. Also challenged on appeal were the excessive punitive damages and the fact that the verdict form lumped four defendants into an amorphous and undefined group.

At the trial, the plaintiffs claimed that State investigators informed management that inadequate staffing to meet resident needs existed and that some employees even left before their orientation was completed. According to an amicus curiae (friend of the court) brief filed by the West Virginia Hospital Association and the West Virginia Health Care Association (WVHCA), the claims of a lack of hydration and nutrition as well as the allegation of inadequate staffing each constitute "acts or treatment" bringing them within the ambit of the MPLA, thereby limiting any noneconomic recovery to \$500,000. Patrick D. Kelly, CEO of the WVHCA, notes, "The Douglas case has the potential to affect the medical malpractice reforms passed by the West Virginia legislature over 10 years ago. The plaintiff argues that the provision of certain services in a nursing home is ordinary care and is not medical care covered by those reforms. The WVHCA takes the position that all services provided in a nursing home are covered by the malpractice reforms."⁶

Lessons Learned

There are a number of important lessons to be learned from this case, regardless of the outcome of the appeal. For example, West Virginia law, like that of many other states, provides that a "violation of a statute is prima facie evidence of negligence." (citations omitted.) The lower court in this case instructed the jury that "a violation of the NHA permits a presumption of negligence." As such, providers should carefully consider whether to challenge surveys that cite "deficiencies." (A deficiency in this context is a violation of a specific state or federal regulation.)

Nursing home deficiencies typically result in enforcement actions by the Centers for Medicare & Medicaid Services (CMS). They are often used to bolster wrongful death cases like the one described above. Where a deficiency cannot be legally or factually supported, providers should weigh the benefits of challenging that deficiency. Because the appeals process is highly structured and governed by federal regulations, providers are advised to seek competent and experienced counsel when considering a legal challenge to deficiencies cited by CMS.

⁴ Petitioner's Brief at 33, *Manor Care, Inc. et al v Tom Douglas, Individually and on behalf of the Estate of Dorothy Douglas*, Supreme Court of West Virginia, Docket No. 13-0470. August 12, 2013.

⁵ *Id.*

⁶ Email from Patrick D. Kelly, (CEO, West Virginia Health Care Association) to Alan C. Horowitz (March 19, 2014)(on file with author).

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