

13-0470

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

Tom Douglas, Individually and
on behalf of the Estate
of Dorothy Douglas

2011 OCT 20 PM 3:05

CATHY S. PLEVIN, CLERK
KANAWHA COUNTY CIRCUIT COURT

vs.

CAUSE NO. 10-C-952

Manor Care, Inc.; HCR Manor Care
Services, Inc.; Health Care and
Retirement Corporation of America,
LLC; Heartland Employment Services,
LLC; John Does 1 Through 10; and
Unidentified Entities 1 Through 10
(as to Heartland of Charleston)

DEFENDANTS

JUDGMENT ORDER

On Tuesday, July 26, 2011, came the Plaintiff, Tom Douglas, Individually and on behalf of the Estate of Dorothy Douglas, by counsel Amy J. Quezon and A. Lance Reins of McHugh Fuller Law Group, PLLC, and came the Defendants, Manor Care, Inc.; HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC; and Heartland Employment Services, LLC, by counsel, Charles F. Johns and Paul Konstanty of Steptoe & Johnson, PLLC, for a jury trial before this Court.

After voir dire and introductory instructions, a six person jury and two alternates of qualified residents of Kanawha County were seated to hear the evidence. Plaintiff presented testimony and evidence from Tara Bowles; Regina Abbott; Beverly Crawford; Patricia Langston; Robin Thompson (via video); Anthony Park, M.D.; David Parker (via video); Katherine Hoops (via video); Devin Revels; Holly Brown; Scott Mitchell, M.D.; Gary Geise (via video); Loren Lipson, M.D.; Linda White (via video); Mark Wilson; and Tom Douglas, before resting on Tuesday, August 2, 2011. At the close of Plaintiff's case, Defendants moved for judgment as a matter of law, as more fully reflected by the record. Defendants' motion was denied after a full hearing. Defendants presented

testimony and evidence from Kim Smith; Sara Jones; Theresa Vogelpohl; David Goldberg, M.D.; and Leroy Booth, before resting their case on Thursday, August 4, 2011.

The Court charged the jury and counsel presented closing arguments on Friday, August 5, 2011, with only one objection. The jury was presented a verdict form to which the Defendants provided only a general objection. Defendants did not request any additional special interrogatories. The jury retired to deliberate, and following deliberations, announced that they had agreed upon a verdict, which was returned as follows:

We, the jury, return the following verdict:

1. Do you find that Plaintiff proved by a preponderance of the evidence that there were violations or deprivations of the West Virginia Nursing Home Act on the part of the Defendants that substantially contributed to injury to Dorothy Douglas? **Yes**

2. What are the amount of damages as a result of the Defendants' violations or deprivations of the West Virginia Nursing Home Act? **\$1,500,000.00**

3. Do you find that Plaintiff proved by a preponderance of the evidence that there was negligence on the part of the Defendants that substantially contributed to the death of Dorothy Douglas? **Yes**

4. What percentage of the Defendants' conduct that caused the death of Dorothy Douglas was medical negligence as compared to non-medical negligence (the total of these two should equal 100%)
Ordinary Negligence 80%; Medical Negligence 20%

5. What amount of compensatory damages do you find Defendants must pay to Dorothy Douglas' children, Tom Douglas and Carolyn A. Douglas Hoy, for their sorrow, mental anguish, and solace which may include society, companionship, and comfort, individually?
Tom Douglas and Carolyn A. Douglas Hoy **\$5,000,000.00**

6. Do you find that Plaintiff proved, by a preponderance of the evidence, that there were breaches of their fiduciary duty on the part of the Defendants that caused harm to Dorothy Douglas? **Yes**

7. What amount of compensatory damages do you find Defendants must pay to the Estate of Dorothy Douglas for their breach?
\$5,000,000.00

8. Under the circumstances of this case, state whether you find by the preponderance of the evidence that punitive damages are warranted against the Defendants: **Yes**

9. What is the total amount of punitive damages which you find by the preponderance of the evidence should be assessed against the Defendants? **\$80,000,000.00**

The Verdict Form was signed by the foreperson and is attached hereto as Exhibit A. At the request of the Defendants, the Court polled the jury and found that all six (6) jurors were in favor of the verdict, and further, the Court found the verdict to be valid and proper and accepted the same as the verdict of the jury as to actual and punitive damages. No special damages having been awarded or at issue, the Court determines that no pre-judgment interest has accrued.

The Court takes judicial notice that "the maximum amount recoverable as compensatory damages for noneconomic loss" in a "medical professional liability action brought against a health care provider" in cases of wrongful death is \$500,000.00. W. Va. Code § 55-7B-8 (Supp. 2011). According to W. Va. Code § 55-7B-8(c), on the first of January, 2004, and in each year thereafter, the limitation for compensatory damages set forth above "shall increase to account for inflation by an amount equal to the consumer price index published by the United States department of labor, up to fifty percent of the amounts specified in subsections (b) and (c) as a limitation of compensatory noneconomic damages." *Id.* The Court determines the maximum amount recoverable for 2011 under this code section is \$594,615.22.

"Medical professional liability" means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. W. Va. Code § 55-7B-2(i) (Supp. 2011). The jury awarded \$5,000,000.00 in noneconomic damages and apportioned twenty percent (20%) of the same to medical negligence. Only \$1 million of the jury award (20% of \$5 million) is subject to the Medical Professional Liability Act noneconomic cap. The Court orders a remittitur of the jury award of \$1 million attributed to medical negligence to \$594,615.22 bringing the final award of noneconomic damages under paragraph 5 of the verdict form to \$4,594,615.22. The objections and exceptions of both parties to the Court's application of the Medical Professional Liability Act are noted and preserved.

Accordingly, it is therefore ORDERED that JUDGMENT be entered against Defendants Manor Care, Inc.; HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC; and Heartland Employment Services, LLC in

the amount of \$91,094,615.22 in favor of Plaintiff, Tom Douglas, Individually and on behalf of the Estate of Dorothy Douglas. Post-judgment interest will accrue on the judgment at the legal rate of seven percent (7%), from the date of entry of this Judgment Order until the judgment is satisfied in full. The Court reserves on allowable costs. The Clerk is directed to forward an attested copy of this Judgment Order to all counsel of record.

SO ORDERED, ADJUDGED AND DECREED this 20th day October

2011.



Honorable Paul Zakaib, Jr.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT. 20th
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF OCTOBER, 2011.


CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TOM DOUGLAS, individually and on behalf of the ESTATE of DOROTHY DOUGLAS,

Plaintiff,

vs.

Manor Care, Inc., et al.,

Defendants.

2013 APR 10 PM 3:15
CATHY S. GARDNER, CLERK
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. 10-C-952

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE FOR NEW TRIAL, OR IN THE FURTHER ALTERNATIVE FOR REMITTITUR

Came this the 28th day of June, 2012, Defendants, MANOR CARE, INC., HCR MANOR CARE SERVICES, INC., HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA, LLC and HEARTLAND EMPLOYMENT SERVICES, LLC (collectively referred to herein as the "Manor Care Defendants") on *Defendants' Motion For Judgment As A Matter Of Law, Or In The Alternative For New Trial, Or In The Further Alternative For Remittitur* filed pursuant to Rules 50(b), 59(a) and (59(e) of the West Virginia Rules of Civil Procedure. Plaintiff, TOM DOUGLAS, individually and on behalf of the ESTATE of DOROTHY DOUGLAS, appeared by counsel. Having provided sufficient time and opportunity for the parties to perfect the record and brief the post-trial motions, the parties agree the issues presented are ripe for consideration.

The Manor Care Defendants' *Motion* sets forth thirty-six (36) separate paragraphs professing error during the underlying trial and/or requesting post-trial relief from the jury verdict. The supporting *Memorandum of Law* outlines the legal issues into nine (9) broad headings. The Court will attempt to synthesize the legal issues by addressing the relief expressly sought by the Defendants.

I. The Application of the MPLA.

The Manor Care Defendants renew¹ several of their arguments related to the application of the West Virginia MEDICAL PROFESSIONAL LIABILITY ACT, W. Va. Code § 55-7B-8(b) [2003] (Supp. 2011) ("MPLA") to the facts of this case and the jury verdict. *See Defendants' Motion at ¶¶ 1-3, 5; Memo. at pp. 7-20.* The Court will address each issue raised by the Defendant.

¹ The application of the MPLA was addressed pre-trial in *Defendants' Motion for Partial Summary Judgment Upon the Plaintiff's Non-Medical Malpractice Claims* (filed on July 1, 2011 and argued during the pre-trial proceedings of July 19, 2011); during the charge conference on formulation of jury instructions (Trial Day #9 – Transcript dated August 2, 2011); and before the entry of the judgment order (*See Hearing Regarding Proposed Judgment Order of October 18, 2011*).

The Court finds that, because the Defendants allowed a "health care provider" to be comingled with the other Defendants that do not qualify under the MPLA as to the determination of compensatory liability and amount of damages, this issue is waived.² Having failed to assert comparative contribution or a request for an allocation of fault on the jury award for compensatory damages amongst the Defendants, the jury attributed 20% of the \$5 million jury award for wrongful death to "medical negligence." See Charge Conference, Transcript, Day 9, pp. 195-332; *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 713 (1982). The remaining portion was attributed to "ordinary negligence." Thus, the Court determined that only 20% of the wrongful death damages was subject to the MPLA cap on noneconomic damages and entered a statutory remittitur accordingly. See Judgment Order entered October 20, 2011 at p. 4.

Notwithstanding the reasoning set forth above regarding the Defendants' failure to separate out entities that were not covered under the MPLA from an entity that was, the Court will address the merits of each of the issues raised by the Defendants related to the application of the MPLA.

A. Several Defendants do not Qualify for the Protection Sought by the MPLA

The Court finds that Manor Care, Inc., HCR Manor Care Services, Inc. and Heartland Employment Services, LLC do not qualify for the protections outlined in the MPLA. The Court recognizes there are statutory triggers within the MPLA which have to be met before one can avail themselves of its protections. Essentially one must qualify as a "health care provider" pursuant to WV Code § 55-7B-3.³ The Court finds that Health Care and Retirement Corporation of America, LLC was the only Defendant licensed by the State of West Virginia to operate

² The Defendants admitted that Manor Care, Inc.; HCR Manor Care Services, Inc.; and Heartland Employment Services, LLC were not licensed to operate a "health care facility" or as a "health care provider" as defined by West Virginia Code § 55-7b-2 during any portion of Dorothy Douglas' residency. See Notice of Filing filed April, 27, 2012 at exhibit "A." In fact, Manor Care, Inc.; HCR Manor Care Services, Inc.; and Heartland Employment Services, LLC have also denied that they provided "health care" as defined by West Virginia Code § 55-7b-2 at Heartland of Charleston during any portion of Dorothy Douglas' residency. *Id.* Defendants admitted during discovery Health Care and Retirement Corporation of America, LLC is a "health care facility", a "health care provider", or provides "health care" as defined by the MPLA. According to Rule 36(b) of the West Virginia Rules of Civil Procedure, any matter admitted in response to a request for admission "is conclusively established unless the court on motion permits withdrawal or amendment of the admission." W. Va. R. Civ. P. 36(b). The Defendants are therefore judicially estopped from now asserting that these three (3) Defendants are included within the terms "health care facility" and "health care provider" or provided "health care" which would allow them to seek the protections of the MPLA. The Court finds as a matter of law that the MPLA is inapplicable as it relates to the conduct of Manor Care, Inc.; HCR Manor Care Services, Inc.; and Heartland Employment Services, LLC.

³ The MPLA defines "health care provider" as "a person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, emergency medical services authority or agency, or an officer, employee or agent thereof acting in the course and scope of such officer's, employee's or agent's employment." It goes on to define "health care facility" as "any clinic, hospital, nursing home or assisted living facility, including personal care home, residential care community and residential board and care home, or behavioral health care facility or comprehensive community mental health/mental retardation center, in and licensed by the State of West Virginia and any state-operated institution or clinic providing health care.

Heartland of Charleston and therefore the only Defendant that could qualify under the MPLA as a "health care facility" and therefore as a "health care provider." Even without the admissions by Defendants Manor Care, Inc., HCR Manor Care Services, Inc., and Heartland Employment Services, LLC mentioned in footnote two (2), there is no evidence of record that any of these Defendants comport with the requirements to be considered a "health care provider", "health care facility" or provided "health care" as defined by the MPLA.

B. The MPLA Does Not Apply Exclusively to this Matter

The Court finds that Plaintiff properly pled and proved theories of liability that did not include the provision of "health care" services as defined by the MPLA. Chief Justice Davis' concurring opinion in *Riggs v. West Virginia University Hospitals, Inc.*, 221 W.Va. 646, 656 S.E. 2d 91 (W.Va. 2007), is instructive. Chief Justice Davis noted that pursuant to the MPLA, a cause of action for medical professional liability is defined as "any liability for damages resulting from the death or injury of a person or tort or breach of contract *based on health care services being rendered*, by a health care provider or health care facility to a patient." *Riggs*, 656 S.E. 2d 91 at 111 (quoting W. Va. Code § 55-7B-2(i), emphasis in original). The facts in *Riggs* were that the hospital "exposed all of its patients, and possibly anyone entering the hospital, to the potential of contracting a serratia bacterial infection." *Id.* Justice Davis stated the "[b]reach of the duty by a [health care facility] to maintain a safe environment, which breach causes injury to a patient or nonpatient, simply does not fall under the MPLA." *Riggs*, 656 S.E. 2d 91 at 111. Like *Riggs*, this case does not involve a single incident of medical malpractice but an exposure of all residents at Defendants' nursing home to potential harm due to insufficient staffing. This matter involved corporate decisions related to budgeting and staffing, including decisions made by individuals such as Mr. Wilson and Mr. Parker, individuals that did not have medical or health care training and who were basing their decisions on budgetary factors. Importantly, Chief Justice Davis stated in *Riggs* that "[t]he fact that the alleged misconduct occurs in a healthcare facility does not, by itself, make the claim one for malpractice....[nor] does the fact that the injured party was a patient at the facility or of the provider, create such a claim." *Riggs*, 656 S.E. 2d 91 at 110, citation omitted. There is nothing to indicate, as the Defendants now suggest, that if part of this matter is medical malpractice then that which is not medical malpractice suddenly becomes medical malpractice.

Defendants recognized this fact at the charge conference, when counsel for Defendants stated:

Let's assume you're in the hospital. You're the victim of medical negligence and you're injured but before you're discharged on the way out to the car, they dump you out of the wheelchair. You've got two causes of action, medical negligence and you've got ordinary negligence. You can sue the hospital for both, which is what we contend has happened in this case. They can argue whatever they want. You get a general negligence instruction where they drop you out of a wheelchair.

See Transcript, Day 9, p. 212.

Although the West Virginia Supreme Court of Appeals has not directly addressed this issue in the nursing home context, the Court finds the Tennessee Court of Appeals' decision in

Smartt v. NHC Healthcare/McMinrville, LLC, 2009 WL 482475 (Tenn. Ct. App. 2009) instructive. In that case, the Court held that under similar medical malpractice statutes, a plaintiff's action against a defendant-nursing home was a "hybrid case" including both medical malpractice and general negligence. The *Smartt* Court stated that even the "fact that the defendants are medical entities will not make their conduct solely medical malpractice" nor does the fact that the care provided was by "certified nursing assistants" make the care "substantially related to the rendition of medical treatment." *Id.* at *2.

The Court also finds that nothing within the Nursing Home Act, codified in W. Va. Code § 16-5C-15, provides that it must be controlled or consumed by the MPLA. In fact, it is stated that the penalties and remedies provided in this section are cumulative and **shall be in addition to all other penalties and remedies provided by law.** W. Va. Code § 16-5C-15(d) (emphasis added). Further, nothing in the specific language of the MPLA states that it controls to the exclusion of all other statutes that include claims other than for medical malpractice.⁴ For these reasons, the Court determines that the MPLA does apply but is not the exclusive cause of action brought and/or available to the Plaintiff.

II. The Jury Verdict Form Was Proper and Provided Defendants with a Fair Decision.

A. The Defendants failed to request an allocation of fault and damages in the compensatory or punitive phase.

The Court finds that the Defendants did not preserve the issue of determination and allocation of fault among Defendants as it relates to compensatory or punitive damages. During the jury charge conference the Defendants did not request an instruction or object to the verdict form the Court selected to use on the basis that it did not allow for an individual determination of liability and an allocation of fault as it relates to compensatory damages.⁵ The Defendants requested a separate determination of liability as it related to the punitive damages phase, wherein both the Court and Plaintiff agreed. However, after the Court explained that it was also going to allow the jury to determine the amount of punitive damages against each Defendant for which punitive liability was found, the Defendants withdrew this request. *See* Transcript, Day 9, p. 300-303.

The Court notes that Defendants did not file a verdict form in the record of this matter at trial. However, following trial, Defendants submitted a verdict form that they assert was presented at trial. However, this submitted verdict form does not allow for the comparative

⁴ Just this year our legislature had an opportunity to clarify this issue when Senate Bill 672, introduced February 20, 2012, was presented during the regular session. This Bill specifically spoke to this issue and would have made it clear that the Nursing Home Act fell within the application of the MPLA so that "actions brought for damages for injuries suffered in a nursing home are subject to the same liability limitations as other medical professional liability actions." However this Bill failed in committee. Thus clearly the West Virginia legislature intended for the Nursing Home Act to remain separate and apart from the Medical Malpractice Act.

⁵ The Court notes the West Virginia Supreme Court of Appeals' Memorandum Decision No. 12-0443, allowed the Defendants to add their proposed verdict form to the record. However, this Court finds that there is nothing in the record to support the argument that Defendants at any point made a requested, asked for an instruction, or raise an objection on the basis that there would not be an individual determination of liability and an allocation of fault as it relates to compensatory damages.

contribution, or allocation of fault to the joint tortfeasors, as required by *Howell v. Luckey*, 205 W.Va. 445, 518 S.E.2d 873 (W.Va. 1999) and is similarly waived. In *Howell*, the Supreme Court of Appeals held:

The right of contribution established in *Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977), is not mandatory but must be asserted by the defendant by filing a third-party claim. **The right of comparative contribution is likewise not automatic.** Because the right of comparative contribution is designed for the benefit of defendant joint tortfeasors, **it can only be invoked by one of the joint tortfeasors in the litigation.** The method for invoking the right of comparative contribution is by requesting that special interrogatories pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure be given to the jury requiring it to allocate the various joint tortfeasors' degree of primary fault.

Howell, at Syl. Pt 4, emphasis added. The only submitted jury instruction in this matter that is even remotely related to this request was Defendants' Jury Instruction No. 12 and was voluntarily withdrawn by Defendants. See Transcript, Day 9, p. 289.

The MPLA states that special interrogatories are to be given "unless otherwise agreed by all the parties to the action". W. Va. Code, § 55-7B-9. Defendants did not request nor propose such special interrogatories and a "litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." *Radec, Inc. v. Mountaineer Coal Development Co.*, 210 W.Va. 1, Syl. Pt. 3 (2000) (citing Syl. pt 1, *Maples v. West Virginia Department of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996)).

B. The Jury Instruction and Verdict Form Were Consistent and did not allow for Duplicative Damages.

1. The Verdict Form did not cause the jury to improperly award damages to non-parties.

The Court finds that the verdict form did not allow the jury to improperly award damages to non-parties, Tom Douglas and Carolyn A. Douglas Hoy. Pursuant to the Defendants' request, Plaintiff agreed to change the jury instruction to state that the damages were being "awarded to the estate for the loss of consortium of Tom and Carolyn." This change was made and the instruction was given as indicated. As to the verdict form, Defendants only requested that Tom and Carolyn be listed on a single line on the verdict form. Plaintiff agreed to make this change and the verdict form presented to the jury reflected this change. Trial Day 9 (August 4, 2011) at p. 312.

W.Va. Code, 55-7-6(b) states:

In every such action for wrongful death, the jury, or in a case tried without a jury, the court, may award such damages as to it may seem fair and just, and, may direct in what proportions the damages shall be distributed to the surviving spouse and children, including adopted children and stepchildren, brothers, sisters, parents and any persons who were financially dependent upon the

decedent at the time of his or her death or would otherwise be equitably entitled to share in such distribution after making provision for those expenditures, if any, specified in subdivision (2), subsection (c) of this section.

W.Va. Code § 55-7-6(b), emphasis added. While the real party in interest is the personal representative of the deceased in a wrongful death action, the damages are not awarded to the estate as asserted by the Defendants but directly to the beneficiaries of the decedent. *Id.* See Syl. Pt. 4, *McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (1991) (Under W.Va. Code, 55-7-6 (1985), our wrongful death statute, the personal representative has a fiduciary obligation to the beneficiaries of the deceased because the personal representative is merely a nominal party and any recovery passes to the beneficiaries designated in the wrongful death statute and not to the decedent's estate.") Thus, this issue is without merit.

2. The Verdict Form did not cause duplicative damages.

The Court finds that the verdict form did not cause duplicative damages. The Court also notes that the Defendants did not preserve this issue by requesting a duplicative damages instruction and, absent plain error, of which this Court finds none, this issue is waived.⁶ The Court finds that even if considered by the Court, the verdict form did not cause the jury to award duplicative damages to the Plaintiff.

The standard of review for a trial court's decision regarding a verdict form is "abuse of discretion." *Perrine v. E.I. DuPont de Nemours*, 225 W. Va. 482, 694 S.E.2d 815, Syl. Pt. 4 (2010) (noting a trial court "has considerable discretion in determining what verdict form to use). "The criterion for determining whether the discretion is abused is whether the verdict form, together with any instruction relating to it, allows the jury to render a verdict on the issues framed consistent with the law, with the evidence, and with the jury's own convictions." *Williams v. Charleston Area Medical Center, Inc.*, 215 W.Va. 15, 19, 592 S.E.2d 794, 798 (2003). As noted, *infra*, the Defendants did not preserve, nor do they assert error in post-trial motions, that the jury was improperly instructed on West Virginia damage law. "If the jury was properly instructed, then there was no abuse of discretion on the part of the trial court in not duplicating the instructions on the verdict form." *Perrine*, 225 W. Va. at 539, 694 S.E.2d at 872.

The Court properly used the special verdict provisions found in Rule 49 of the West Virginia Rules of Civil Procedure. Rule 49 "provides a proper vehicle to determine complex

⁶ Although avoiding duplicative damages was mentioned by Plaintiff's Counsel numerous times, Counsel for Defendants never requested an instruction in this regard and only argued that several of Plaintiff's claims should not have been allowed to go to the jury. See Transcript, Day 9, pp. 320-25; *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318 (2001) (citing Syl. Pt. 7 of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)). The *Sheetz* Court did not address an unpreserved double recovery argument, but noted that if "plain error" existed, the Court would address the merits. To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings). Although only persuasive authority, this Court finds instructive *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101 (9th Cir. 2001); *Rosenberg v. Sears, Roebuck and Co.*, 57 F.3d 1078 (9th Cir. 1995); and *Meron Tech. Distrib. Corp. v. Discreet Indus. Corp.*, 189 Fed.Appx. 3, 4 (2d Cir. 2006) ("As to whether the jury awarded duplicative damages, defendants have waived any argument regarding the jury instruction or verdict sheet given their failure to raise this issue in their requests to charge or at the charging conference, or to lodge a timely objection, or to request that the court poll the jury.")

issues and requires that where the special verdicts or interrogatories are utilized, they may form a basis for altering a general verdict. *Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 682, 289 S.E.2d 692, 698 (1982).

The verdict form can be read consistent with the jury instructions. The negligence/medical negligence claim on the verdict form (questions 3 and 4) relate to the "death of Dorothy Douglas" and question 5 allows for an award of wrongful death damages as provided in Jury Instruction No. 11. The Defendants did not object to this jury instruction nor do they assert the award of wrongful death damages is duplicative. The NHA claim (questions 1 and 2) and fiduciary duty claims (questions 6 and 7) on the verdict form address "survival" damages. There is no evidence that the jury, having been properly instructed, acted improperly in allocating the survival damages between the NHA and fiduciary claims. This is further supported by the jury award of \$1.5 million for the NHA claim and \$5 million for the fiduciary claim.

The Court recognizes that this case is not a single incident case like a botched surgery or an auto accident; it is a course of events that occurred over an extended period of time, 19 days. As such there was proof of multiple negligent acts and multiple injuries over this extended period of time. As such this Court does not know which alleged breaches and damages were awarded for which claim.⁷ The Defendants had ample opportunity to propose special interrogatories or even an instruction on double recovery that would have addressed this issue and prevented even any potential concern in this regard. As such a request was not made by the Defendants, this issue is without merit.

3. The evidence was sufficient to support Tom Douglas and Carolyn Hoy's damages.

The Court finds that there was sufficient evidence to support the award of wrongful death damages. Special interrogatories 3, 4, and 5, were based upon negligence that caused Ms. Douglas' death and, pursuant to West Virginia's wrongful death statute, provided for Ms. Douglas' children's "sorrow, mental anguish, and solace which may include society, companionship, and comfort." See W. Va. Code, § 55-7-6(c)(1)(A) ("The verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent.") Defendants' assertion that the evidence was insufficient to support this portion of the jury's verdict is without merit, as evidence was presented of both Mr. Douglas and Mrs. Hoy's relationship with their mother and their loss, not only with the words said but by the demeanor and emotion exhibited by Mr. Douglas. Defendants also never objected to Carolyn Hoy's inclusion on the verdict form or moved for a directed verdict as to her damages, thus waiving this issue. This issue is without merit.

III. Breach of Fiduciary Claim.

⁷ One of the great things about our system of jurisprudence is that, other than the jurors themselves, no one knows whether the jury found negligence and awarded damages to Dorothy Douglas' Estate and Wrongful Death Beneficiaries related to the fall and head trauma, dehydration suffered, or violations of her dignity. There was evidence related to these and many more issues presented to the jury during this ten (10) day trial

A. Defendants owed a fiduciary duty to Dorothy Douglas.

The Court finds that the Defendants were in a fiduciary relationship with Dorothy Douglas and owed a fiduciary duty to her. According to the Restatement (Second) of Torts § 874, "one standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." According to the comments, a fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts § 874, cmt. a. Further, a fiduciary who commits a breach of his duty "is guilty of tortious conduct to the person for whom he should act." *Id.* at cmt. b.

The West Virginia Supreme Court of Appeals has held that a fiduciary relationship exists between a physician and a patient. *Webb v. West Virginia Bd. of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 at fn. 1 (W.Va. 2002)(citing Syl. Pt. 1, *State ex rel. Kitzmiller v. Henning*, 190 W.Va. 142, 437 S.E.2d 452 (1993)). This is further supported by West Virginia statutory law, as "malpractice insurance" is defined as insurance arising "...as the result of negligence in rendering expert, *fiduciary* or professional service." W. Va. Code § 33-1-10(e)(9)(emphasis added). Courts in neighboring states have examined similar issues. See *John G. v. Northeastern Educational Intermediate Unit 19*, 490 F.Supp.2d 565 (M.D.Pa. 2007); *Joseph M. v. Northeastern Educational Intermediate Unit 19*, 516 F.Supp.2d 424 (M.D.Pa. 2007); *Vicky M. v. Northeastern Educational Intermediate Unit 19*, 486, F.Supp.2d 437 (M.D.Pa. 2007). Further, Courts in other states have recognized that a fiduciary relationship exists between a nursing home and its residents based on at least in part on the compromised condition these residents are generally in. See *Greenfield v. Manor Care, Inc.*, 705 So.2d 926 (Fla.App. 4 Dist. 1997)(overruled on other grounds)(involving the same corporate Defendants as the case at bar, in which the court held there was a "fiduciary duty between Manor Care and it [sic] residents, which arose out of a special relationship independent of the contract").

The Court finds that Dorothy Douglas was a vulnerable adult upon admission to Defendants' facility and in a position where she trusted and depended on the Defendants such that a fiduciary relationship was present. Thus, Defendants owed a duty to Ms. Douglas.

B. Defendants breached their fiduciary duty to Dorothy Douglas.

As a fiduciary, Defendants were required to act in the best interest of Ms. Douglas. There was sufficient evidence at trial for the jury to determine that the Manor Care Defendants failed to act in the best interest of Dorothy Douglas and thereby breached their duty. The Court finds that despite clear notice and knowledge of problems at the facility, there was no evidence that the Manor Care Defendants informed Ms. Douglas or her family that they were short-staffed, that there had been a history of complaints of short staffing, that they had been cited by State Investigators for staffing violations, or that they were unable to provide the care she needed and her condition was deteriorating. The contrary is true, the Manor Care Defendants took steps to intentionally withhold this information from Ms. Douglas and her family. The West Virginia Supreme Court has held that "[w]here a fiduciary relationship exists and there is an indication of fraud a presumption of fraud arises and the burden of going forward with the evidence rests upon the fiduciary to establish the honesty of the transaction." *Napier v. Compton*, 210 W.Va. 594, 596 558 S.E.2d 593, 595 (W.Va. 2001)(citing Syl pt 10, *Work v. Rogerson*, 152 W.Va. 169, 160

S.E.2d 159 (1968)).

This issue is without merit.

C. The Jury Instruction regarding fiduciary duty was not fatally flawed.

Defendants did not specifically object or otherwise preserve any objection regarding any portion of the substance of the fiduciary duty instruction at trial. See Transcript Day 9, pp. 238-41. The only objection made by the Defendants to the fiduciary instruction was that it should not be given. There was no objection provided with specificity as to what portions of the instruction were in error. Even if preserved, however, for the reasons set forth above regarding fiduciary duty and the jury instructions given, the Court determines that this issue is without merit.

IV. Tom Douglas Should Not Be Dismissed As A Plaintiff In His Individual Capacity.

Defendants failed to object or otherwise move to dismiss Tom Douglas at any time prior to the verdict in this matter. Thus, this issue has been waived. Even if not waived, the appropriate procedure would not be dismissal pursuant to Rule 17(a) of the West Virginia Rules of Civil Procedure, which states:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

W. Va. R. Civ P. 17(a). Tom Douglas, as the Administrator of the Estate of Dorothy Douglas, was without question the appropriate party in this matter, nothing material would have changed and Defendants' motion is therefore without merit.

Further, as set forth above, W.Va. Code, 55-7-6(b) states that "the jury . . . may award such damages . . . and, may direct in what proportions the damages shall be distributed to the surviving spouse and children." W.Va. Code § 55-7-6(b). Thus there was no harm in Tom Douglas' damages being considered individually by the jury in this matter. See *Richardson v. Kennedy*, 197 W.Va. 326, 475 S.E.2d 418 (1996); *DeVane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (W.Va. 1999)(citing *Richardson, supra*). The relief of dismissal sought by the Defendants is denied.

V. The Defendants Were Not Unduly Prejudiced by the Court's Handling of Punitive Damages.

The Court bifurcated this matter internally and did not allow admission of punitive evidence until after the Court made a specific finding that the Plaintiff put on sufficient evidence for the issue of punitive damages to go to the jury. At this point, the Court allowed limited

evidence of Defendants' wealth and reprehensible conduct to be admitted before the jury.⁸ This decision is standard procedure in this Court when it is determined that bifurcation will not promote the recognized goals of judicial economy, convenience of the parties, or the avoidance of prejudice. See *Bennett v. Warner*, 179 W.Va. 742, 372 S.E.2d 920 (1988). See also *State ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (W.Va. 1992) (citing *TXO Production v. Alliance Resources*, 187 W.Va. 457, 468-71, 419 S.E.2d 870, 881-84 (1992), petition for cert. filed, 61 U.S.L.W. 3206 (U.S. Sept. 17, 1992) (No. 92-479)) (Although a separate trial on punitive damages is not listed in *TXO* as a protection against unfair prejudice, "in extraordinary cases when none of the listed protections suffice, a separate trial on punitive damage is justified."), emphasis added.

A. Legal standard for bifurcation.

This Court has discretion in making the decision whether to bifurcate proceedings. *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W.Va. 168, 381 S.E.2d 367 (W.Va. 1989). Absent a showing of prejudice caused by the refusal to try the issues separately, a circuit court does not abuse its discretion in refusing to bifurcate the issues of compensatory and punitive damages. *Id.* at Syl. Pt 3 (citing W. Va. R. Civ P. 42(c)).

B. The Defendants were not unduly prejudiced by the admission of their wealth information.

Defendants made only a general objection to the admission of the Defendants' financial wealth and thus waived the specific objections argued in their post trial motions. See Transcript, Day 8, pp. 70, 87; *Radec, supra*. Defendants also did not object to Plaintiff's closing argument and further did not address the financial information whatsoever during their own closing argument, an opportunity to clarify any perceived difference of opinion as to the financial information and its use. Further, the tax returns were not utilized by either party or mentioned until closing arguments.

C. The Defendants were not unduly prejudiced by the admission of evidence showing reprehensible conduct.

Defendants' other argument for prejudice is the Court's admission of state conducted inspections of their facility by the West Virginia Office of Health Facility Licensure and Certification.

Pursuant to *McGinnis*, the Court was provided a copy of redacted surveys from November 13, 2008, and April 29, 2009, and reviewed them *in camera*.⁹ It was clear that the

⁸ Two redacted West Virginia Office of Health Facility Licensure and Certification Surveys and a consolidated tax return were admitted.

⁹ In *State v. McGinnis*, 193 W.Va. 147 (1994), the Supreme Court of Appeals set forth the following procedure for trial courts considering this type of Rule 404(b) evidence: the trial court should conduct an *in camera* hearing; after hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts; if a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 and conduct the balancing required under Rule 403; if the trial court is then satisfied that the evidence is admissible, it should

surveys were for Heartland of Charleston and the Court determined that the surveys were relevant under Rules 401 and 402 and conducted the balancing analysis required by Rule 403 of the West Virginia Rules of Civil Procedure. The Court determined that the surveys were only to be used for a limited purpose and ordered that a limiting instruction to that effect be utilized.

Additionally, the Defendants assert that the limiting instruction given by the Court was erroneous. The parties worked together to create the limiting instruction given by the Court. Thus, Defendants cannot attempt to assign error to an instruction that they helped create and to which they did not object. *Radec, supra*. In *State ex rel. Tinsman v. Hott*, 188 W.Va. 349, 424 S.E.2d 584 (W.Va. 1992), the Supreme Court of Appeals held that in a case like the one at bar where most of the evidence will be introduced to prove liability and the "only evidence to be introduced exclusively on punitive damages concerns [the Defendants] ability to pay and his alleged prior bad acts", because of the limited evidence specifically related to punitive damages the goal of avoidance of prejudice can be achieved without resorting to a separate trial by using Rule 105 of the West Virginia Rules of Evidence. Rule 105 provides:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

See *TXO Production v. Alliance Resources*, 187 W.Va. 457, 468-71, 419 S.E.2d 870, 881-84 (1992).

As stated above, the Court limited Plaintiff's evidence until it was determined that the Plaintiff had put on sufficient evidence that Plaintiff's claim for punitive damages would be submitted to the jury for consideration and this evidence was relevant to show that Defendants were on notice of short staffing and fraudulent scheduling before Dorothy Douglas' residency. At that point, the Court allowed Plaintiff to put on punitive evidence and instructed the jury appropriately. The Court took the appropriate steps to prevent the surveys at issue from being used inappropriately by the jury, and Defendants have failed to demonstrate that admission of these surveys were unduly prejudicial as to require bifurcation in this matter.

VI. The Punitive Damage Award Is Appropriate

Due to the in depth analysis under of the punitive damages award in this matter pursuant to *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991) in the separate *Garnes* Order entered by this Court, the Court will not repeat its findings and holdings as to all of the issues raised by the Defendants here. Therefore, the Court will only address the issues raised by the Defendants that are not addressed by this Court in its *Garnes* Order.

A. Defendants were Not Entitled to an Instruction Defining the Standards for

instruct the jury on the limited purpose for which such evidence has been admitted; a limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Punitive Damages Liability

The Court finds that the jury was properly instructed as to the standards for punitive damage liability. Defendants assert that this Court erred in failing to give an instruction defining the terms "gross fraud, malice, oppression, or wanton, willful or reckless conduct" and "criminal indifference to a civil obligation." See Defendants' Memorandum at p. 48. The Court is unable to find any civil authority in the State of West Virginia that requires these terms to be defined. In the criminal case of *State v. Bartlett*, 177 W.Va. 663, 355 S.E.2d 913 (W.Va. 1987), the West Virginia Supreme Court of Appeals held that a circuit court did not err in declining to give an instruction defining "reckless disregard for the safety of others." *Id.* at 917.

The Court in *Bartlett* held that the circuit court's denial of the instruction did not deny the defendant of a fair trial and that: "We have never held that every term in a jury instruction must be defined, nor does the petitioner direct us to any authority requiring that the term in question be defined." *Id.* Further, "[r]eckless disregard' is not so arcane a term that the lack of a definition instruction left the jury entirely without guidance." *Id.* Defendants have failed to establish that the instruction at issue "concerns an important point in the trial so that the failure to give it seriously impair[ed] [the Defendants'] ability to effectively present a given defense." See Defendants' Memorandum at p. 48 (quoting *Perrine v. E.I. du Pont de Nemours and Co.*, 694 S.E.2d 815, 873 (W.Va. 2010)). This issue is without merit.

B. The Defendants withdrew their request for separate determination and allocation in the punitive phase.

The Court finds that the Defendants did not preserve this issue and withdrew their request to have punitive liability and punitive damages separately allocated amongst the Defendants. Defendants assert that this Court erred by only providing one line for all the Manor Care Defendants as it relates to punitive damages. During the charge conference, Defendants initially asked that each Defendant be separated out as it relates to punitive liability, and then only *one* line for the amount of punitive damages awarded, if any. See Transcript Day 9, p. 302. The Court finds this problematic; if the jury determined that punitive damages should be awarded against some or all of the Defendants and then awarded a single sum, there would be no allocation as to which Defendant was to pay what portion of the punitive award and it would be troublesome for the Court to attempt to allocate these damages on its own post trial. When it was indicated that this was unacceptable and that a separate line would also have to be offered for the amount of punitive damages awarded, if any against each Defendant, Defendants voluntarily withdrew their request for separate lines for the Defendants on the issue of punitive liability and damages, stating, "If the Court's inclined to do that, then we want all of the Defendants together with one line. . . ." See Transcript, Day 8, p. 302, lines 13-16. See *Radec, Inc. v. Mountaineer Coal Development Co.*, 210 W.Va. 1, Syl. Pt. 3 (2000) (citing Syl. pt 1, *Maples v. West Virginia Department of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996)) ("A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.") Thus, Defendants waived this issue and it is without merit.

C. The Absence of a *Philip Morris* Instruction Did Not Violate Due Process

The Court finds that the Defendants have waived this issue for consideration. Defendants

proposed jury instruction number 2 did include the requested language from *Philip Morris v. Williams*, 549 U.S. 346 (2006). However, Defendants voluntarily withdrew this instruction. See Transcript Day 9, pp. 277. “[I]t has been noted that a defendant ‘cannot ... be allowed to alter retroactively [his] trial strategy.’” *Radec*, at 3 (citing *McDougal v. McCammon*, 193 W.Va. 229, 239, 455 S.E.2d 788, 798 (1995) (quoting *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 518 (4th Cir.1985))). Thus, this argument has been waived. However, the only evidence that the Defendants refer to are the redacted surveys that have been addressed *supra*. This Court presumes that this is the only evidence for which the Defendants raise the issue of the need for a *Philip Morris* instruction. This Court did provide a limiting instruction regarding the surveys that form the basis of Defendants’ proposed assignment of error. See Transcript Day 10, pp. 41-42. It is improper to assume that the jury did not follow the Court’s instruction and thus the punitive award should not be considered as being contrary to the *Philip Morris* decision. This issue is without merit.

D. The Jury was Properly Allowed to Consider Evidence of the Wealth of Manor Care, Inc.

The Court finds that the jury was properly allowed to consider the wealth of Manor Care, Inc. Direct evidence was presented at trial regarding Manor Care, Inc.¹⁰ The evidence at trial clearly supported that Manor Care, Inc. was an appropriate Defendant and therefore properly considered and ultimately punished by the jury in this matter. This issue is without merit.

As to Manor Care, Inc.’s financial condition and its use during closing argument by the Plaintiff, Defendants did not object to Plaintiff’s closing argument in which Plaintiff pointed out the company’s gross revenues and further did not address the financial information in order to differentiate revenues versus income or in any other manner whatsoever during their own closing argument. Defendants waived their opportunity to clarify any perceived difference of opinion as to the financial information and its use and similarly waived the instant argument before this Court in its post-trial review. “The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.”¹¹ *West Virginia University/Ruby Memorial Hosp. v. West Virginia Human Rights Com’n*,

¹⁰ Defendants memorandum also assigns error for allowing the jury to consider the wealth of HCR Manor Care, Inc. However, the wealth of HCR Manor Care, Inc. was not entered at trial or presented to the jury. Therefore there can be no assignment of error as it relates to the wealth of HCR Manor Care, Inc.

¹¹ It should be noted that the HCR Manor Care Defendants raise error with the use of this consolidated tax return and claim the profitability of the individual facility, Heartland of Charleston, should have been the financial information provided to the jury. The HCR Manor Care Defendants did object to the tax returns coming in, but only stated a general objection with no specificity. See Transcript day 8, pp. 70, 87. Additionally, the HCR Manor Care Defendants never provided financial information for the individual nursing home, Heartland of Charleston, prior to trial, nor did the HCR Manor Care Defendants move during trial to admit such evidence. The Court also recognizes after reviewing the financial information the HCR Manor Care Defendants submitted to the Court *in camera* on day one (1) of trial (See Plaintiff’s Notice of Filing filed on June 25, 2012, exhibit “C”) that this production contained no financial information for Health Care & Retirement Corporation of America, LLC, the Defendant that holds the license to operated Heartland of Charleston. See Plaintiff’s Trial Exhibit “27”. Additionally, Kathryn Hoops testified on day 7 page 50 that the sole member of Health Care & Retirement Corporation of America LLC is Manor Care, Inc. Consistent with *TXO Production Corp. v. Alliance Resources Corp.* 187 W.Va. 457 at 477, the HCR Manor Care Defendants cannot be less than forthcoming during discovery and then claim foul when the Plaintiff has to use the only information available to them at trial.

217 W.Va. 174, 617 S.E.2d 524 (W.Va. 2005) (quoting *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (W.Va. 1996); See also *Hanlon v. Logan County Board of Education*, 201 W.Va. 305, 315, 496 S.E.2d 447, 457 (1997) ("Long standing case law and procedural requirements in this State mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal.").

This issue is without merit.

E. The Amount of the Punitive Damages Award is Not Unconstitutionally Excessive

This issue, including its three sub-parts, is addressed fully in the Court's separate *Garnes* Order and will not be repeated here. See Findings of Fact and Conclusions of Law included in separate *Garnes* Order entered by this Court.

VII. There was no Reversible Error in Instructing the Jury on State and Federal Nursing Home Regulations.

The Court finds that the jury was properly instructed as it relates to the application of State and Federal nursing home regulations that applied to Heartland of Charleston. The standard in West Virginia is well-settled and "[a] verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole [were] accurate and fair to both parties." See *Stevenson v. Independence Coal Co., Inc.*, *supra*. (citations omitted). As to regulations, the West Virginia Supreme Court of Appeals has held:

Failure to comply with a fire code or similar set of regulations constitutes *prima facie* negligence, if an injury proximately flows from the non-compliance and the injury is of the sort the regulation was intended to prevent; on the other hand, compliance with the appropriate regulations is competent evidence of due care, but does not constitute due care *per se* or create a presumption of due care.

In re Flood Litigation, 216 W.Va. 534, 549 607 S.E.2d 863, 878 (W.Va. 2004) (citing Syl. Pt 1, *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (1990), emphasis added. The Court held that this holding is based on the following rationale:

If the defendants knew or should have known of some risk that would be prevented by reasonable measures not required by the regulation, they were negligent if they did not take such measures. It is settled law that a statute or regulation merely sets a floor of due care. *Restatement (Second) of Torts*, § 288C (1965); *Prosser and Keaton on Torts*, 233 (5th ed.1984). Circumstances may require greater care, if a defendant knows or should know of other risks not contemplated by the regulation.

Id., 182 W.Va. at 562, 390 S.E.2d at 209, citations in original, emphasis added. See also *Shaffer v. Acme Limestone Co., Inc.* 206 W.Va. 333, 524 S.E.2d 688 (W.Va. 1999) ("As indicated in the

body of this opinion, prior decisions of this Court have determined that civil liability may be imposed from a violation of our motor vehicle statute.”). *See also*, Syl. pt. 5, *Reed v. Phillips*, 192 W.Va. 392, 452 S.E.2d 708 (“In light of W. Va. Code § 37-6-30 (1985) and the rules and regulations promulgated by the West Virginia State Fire Commission pursuant to W. Va. Code § 29-3-5 (1992), the absence of a smoke detector in a one-or two-family dwelling constitutes prima facie evidence of negligence on the part of a landlord if the injury proximately flows from the non-compliance”).

The West Virginia Nursing Home Act states that any nursing home that “deprives a resident of any right or benefit created or established for the well-being of this resident by the terms of any contract, by any state statute or rule, or by any applicable federal statute or regulation, shall be liable to the resident for injuries suffered as a result of such deprivation.” W. Va. Code § 16-5C-15(c), *emphasis added*. This statute goes on to state that upon finding that a resident has been so deprived and was injured as a result, unless there is a finding that the nursing home “exercised all care reasonably necessary to prevent and limit the deprivation and injury to the resident, compensatory damages shall be assessed in an amount sufficient to compensate the resident for such injury.” *Id.* Further, “where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, punitive damages may be assessed.” *Id.* Thus, the West Virginia Statutes state that a violation of these regulations is to be considered by the jury in this matter. Courts in other states have examined the exact same Federal regulations along with similar state regulations in cases against nursing homes like the one at bar. *See Estate of French v. Stratford House*, 333 S.W.3d 546 (Tenn. 2011); *McLain v. Mariner Health Care, Inc.*, 279 Ga.App. 410, 631 S.E.2d 435 (Ga.App. 2006); *Scampone v. Grane Healthcare Co.* 11 A.3d 967 (Pa.Super. 2010); *McCorkle Farms, Inc. v. Thompson*, 79 Ark.App. 150, 84 S.W.3d 884 (2002).

The Court finds that the jury instructions were not confusing or improperly vague in this matter. Further, Defendants have failed to establish that there was any error in the instructions given to the jury in this matter. Thus, this issue is without merit.

VIII. The Jury was Properly Permitted to Consider the State Citations for a Limited Purpose.

The Court finds that redacted citations issued by the State of West Virginia were properly admitted for a limited purpose. “Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.” *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983). *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (W.Va. 1992) (citing Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983)). Defendants assert that the Court erred by allowing in the redacted surveys conducted by the West Virginia Office of Healthcare Facility Licensure and Certification at Heartland of Charleston. As noted by Plaintiff’s counsel, Defendants’ Counsel agreed that these surveys would come in during the punitive phase of trial. *See* Transcript Day 1 pages 12-13.

The Court conducted a proper analysis pursuant to *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (W.Va. 1994), having undertaken an *in camera* review of the documents at issue and listened to lengthy arguments of counsel. Following said review, as previously discussed, the Court determined that the surveys were only to be used for a limited purpose and provided a

limited instruction to that effect. Specifically, the Court instructed the jury not once but on two occasions regarding the surveys in this matter:

Ladies and gentlemen of the jury, you're going to be hearing testimony regarding surveys and the evidence of surveys conducted prior to the residency of Dorothy Douglas are to be considered by you solely for the purpose of establishing that the defendants were put on notice and possessed knowledge of both State and United States safety rule violations. You are not permitted to consider this evidence in reaching your decision on whether the defendants breached the standard of care or violated any State or federal regulation in September of 2009 during Ms. Douglas' residency.

The evidence of Surveys conducted prior to the residency of Dorothy Douglas are to be considered by you solely for the purpose of establishing that the defendants were put on notice and possessed knowledge of both State and United States safety rule violations. You are not permitted to consider this evidence in reaching your decision on whether the Defendants breached the standard of care or violated any State or Federal regulation in September of 2009, during Ms. Douglas' residency.

See Transcript Day 7, p. 84 and Day 10, pp. 41-42 respectively.

Rule 404(b) of the West Virginia Rules of Evidence states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See W. Va. R. Evid. 404(b), emphasis added. See *Stafford v. Rocky Hollow Coal Co.*, 482 S.E.2d 210 (W.Va. 1996) (Court's discussion of proper 404(b) analysis).

The State surveys presented at trial provided evidence of knowledge by Defendants of prior instances of substandard care directly related to the staffing issues suffered by Ms. Douglas that ultimately led to her injuries and death. Although the Appellate Courts in West Virginia have not ruled on this specific issue, Courts in numerous other jurisdictions have expressly held that state nursing home inspection reports are admissible in civil actions against nursing homes. See *Horizon CMS Healthcare v. Auld*, 985 S.W.2d 216 (Tex. Ct. App. – Fort Worth 1999), *aff'd in part, rev'd on other grounds*, 34 S.W.3d 887 (2000); *Mitchell v. State*, 491 So.2d 596, 599 (Fla. 1st DCA 1986), *Flint City Nursing Home, Inc. v. Depreast*, 406 So.2d 356 (Ala. 1981), *Montgomery Health Care Facility, Inc. V. Ballard*, 565 So.2d 221 (Ala. 1990). Courts in other states have also held that surveys can be admitted as evidence relevant to determining the veracity of a plaintiff's claims. See *Advocat Inc. v. Sauer*, 111 S.W.3d 346, (Ark. 2003) *cert. denied Advocat, Inc. v. Sauer*, 124 S. Ct. 535, 2003, (Nov. 10, 2003) and *Sauer v. Advocat, Inc.*, 124 S. Ct. 532, (Nov. 10, 2003).

As to punitive damages, the West Virginia Supreme Court of Appeals held in *State ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (W.Va. 1992), that evidence of the defendant's earlier sexual harassment of other employees was properly excluded on issue of liability but was admissible on the issue of punitive damages, and that a single trial on both issues with an instruction pursuant to Rule 105 of the West Virginia Rules of Civil Procedure would avoid prejudice against the defendant without sacrificing the goals of judicial economy and convenience of the parties. According to the Court, the evidence of similar conduct must be sufficient "to support a finding by the jury that the defendant committed the similar act." *Id.* at 590 (citing *Huddleston v. U.S.*, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988); *TXO Production v. Alliance Resources*, 187 W.Va. 457, 468-71, 419 S.E.2d 870, 881-84 (1992), *petition for cert. filed*, 61 U.S.L.W. 3206 (U.S. Sept. 17, 1992).

Among factors that the jury should consider in determining the reprehensibility of the Defendant's conduct are: how long the defendant continued in his actions, whether he was aware his actions were causing or likely to cause harm, and whether/how often the defendant engaged in similar conduct in the past. *Boyd v. Goffoli*, 216 W.Va. 552 (W. Va. 2004). This is because evidence showing that the defendant knew that the alleged conduct on its part would probably result in injury to the plaintiff, because it knew that such carelessness on its part in the past had resulted in similar injuries to others, yet continued in this course of conduct in utter indifference to the consequences, has a legitimate tendency to show that the defendant acted with conscious or reckless disregard. *Gunthorpe v. Daniels*, 257 S.E.2d 199 (Ga. 1979).

Similarly, in *State Farm Mutual Auto Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2008), the United States Supreme Court reaffirmed the principle that evidence of a defendant's other acts may be used in determining an award of punitive damages. The Court clarified that due process does not require that the other acts be identical but that there must be a connection between the defendant's other acts and the harm suffered by the plaintiff: "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that *conduct must have a nexus to the specific harm suffered by the plaintiff.*" *Id.* at 1522. (emphasis added).

In the case at bar, the Plaintiff introduced other acts of Defendants that were similar to the acts that caused the harm to Ms. Douglas. The Plaintiff did not attempt to use this case "as a platform to expose, and punish, the perceived deficiencies of . . . [the Defendants'] operations throughout the country." *See Id.* at 1521. Rather, the Plaintiff admitted evidence of Defendants' similar acts of gross negligence in the same nursing home to demonstrate the reprehensibility, deliberateness and culpability of the Defendant's conduct in the punitive damages phase.

The Court also finds that the surveys are admissible as "public records" exception under Rule 803(8) of the West Virginia Rules of Evidence as well as records prepared by government organizations under Rule 803(6) of the West Virginia Rules of Evidence. *See Lacy v. CSX Transp. Inc.*, 205 W.Va. 630, 639 520 S.E.2d 418, 437 (W.Va. 1999) (citing *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir.), "*cert. denied*, 442 U.S. 920, 99 S.Ct. 2845, 61 L.Ed.2d 288 (1979) (governmental functions could be included within the broad definition of 'business' in Rule 803(6)").

As to Defendants' argument that some of the statements were made by unidentified persons that were not state employees, it must be noted that many of the specific statements made by such individuals were admitted during the testimony of Defendants' witness and current employee, Sara Jones. Defendants, over Plaintiff's objection, opened the door to these statements by asking Ms. Jones if she would place her loved ones at Defendants' facility. Plaintiff requested the ability to question Ms. Jones regarding her knowledge of the concern forms and complaints made in the surveys, and the request was granted. In fact, Defendants' counsel on redirect of Ms. Jones discussed some of these statements as well. See Transcript Day 9 at 157-58. This issue is without merit.

As to Defendants' argument that the Court's limiting instruction was defective, this too is without merit as discussed *supra*.

IX. The Defendants Are Not Entitled to a New Trial

The Defendants assert that based on the totality of errors made by this Court that they are entitled to a new trial. The Court does not agree with Defendants' assessment that there were significant and substantial errors in the trial of this matter. At most, any error was harmless and does not warrant a new trial. Further, Defendants have failed to establish that a remittitur is warranted or appropriate. The West Virginia Supreme Court of Appeals has held that parties are entitled to a "fair trial"; not a "perfect trial" because "such a thing does not exist." *Sprouse v. Clay Communication, Inc.*, 158 W.Va. 427, 464 211 S.E.2d 674, 698 (W.Va. 1975). Defendants' Motion For Judgment As A Matter Of Law, Or In The Alternative For New Trial, Or In The Further Alternative For Remittitur is hereby denied.

Accordingly, for the reasons set forth above, the Court hereby **DENIES** Defendants' Motion. All of Plaintiff and Defendants' objections and exceptions are noted and preserved.

Entered this the 10th day of April, 2012.


Honorable Paul Zakaib

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 11
DAY OF April 2012

CATHY S. GATSON CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED il
2013 APR 10 PM 3:15
CATHY S. BAILEY, CLERK
KANAWHA COUNTY CIRCUIT COURT

TOM DOUGLAS, Individually and
on behalf of the ESTATE of DOROTHY DOUGLAS,

Plaintiff,

vs.

Civil Action No. 10-C-952

MANOR CARE, INC., et al.,

Defendants.

**CIRCUIT COURT GARNES ORDER
ON JURY AWARD OF PUNITIVE DAMAGES**

On August 5, 2011, a jury awarded the Plaintiff \$11.5 million in compensatory damages¹ and \$80 million in punitive damages against the "HCR Manor Care" Defendants. West Virginia law requires the circuit court to provide a meaningful review of the punitive damage award as set forth in *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010). The Court conducted extensive post-trial hearings on December 8, 2011 and June 28, 2012. All parties were present and represented by counsel of record.

At the outset, it should be noted that West Virginia has a long history and well developed precedent regarding punitive damages. See *Punitive Damages Law in West Virginia*, Robin Jean Davis and Louis Palmer, Jr. (2010). This *Perrine* order involves issues of first impression in West Virginia. First, this case involves reprehensible conduct which resulted in the wrongful death of Dorothy Douglas. No case in West Virginia provides a benchmark to measure punitive damages in such context. Second, the entire punitive damage verdict is covered by insurance. These factors weigh heavily on the scales of justice when determining whether the \$80 million punitive damage award is appropriate under West Virginia law.

WHEREUPON, the Court takes note that the transcript of the trial and all subsequent hearings have been submitted for the record. The parties have been provided adequate time and opportunity to fully brief the propriety, or lack thereof, of the award of punitive damages. The Court carefully reviewed the full trial transcript, the legal arguments presented by all parties, both written as well as those presented in oral argument, and is prepared to issue its findings of fact and conclusions of law.

PROCEDURAL FINDINGS OF FACT

1. A jury trial commenced on July 26, 2011.
2. After voir dire and introductory instructions, a six person jury and two alternates

¹ The compensatory verdict was statutorily remitted to approximately \$11 million pursuant to the MPLA noneconomic cap. See *Judgment Order* entered on October 20, 2011.

of qualified residents of Kanawha County were seated to hear the evidence without objection.

3. Plaintiff presented testimony and evidence from Tara Bowles; Regina Abbott; Beverly Crawford; Patricia Langston; Robin Thompson (via video); Anthony Park, M.D.; David Parker (via video); Katherine Hoops (via video); Devin Revels; Holly Brown; Scott Mitchell, M.D.; Gary Geise (via video); Loren Lipson, M.D.; Linda White (via video); Mark Wilson; and Tom Douglas, before resting on Wednesday, August 3, 2011.

4. On day six (6) of trial the Court made the determination that Plaintiff had established sufficient evidence to allow the issue of punitive damages to go to the jury. Plaintiff admitted two additional pieces of evidence in support of his punitive damage claim; namely, the redacted regulatory surveys from April, 2009, and November, 2008, and the consolidated tax return previously disclosed by the HCR Manor Care Defendants.

5. At the close of Plaintiff's case, Defendants, Manor Care, Inc. and HCR Manor Care Services, Inc., moved for directed verdict pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure. *See* Trial Transcript at Day 8 pages 80-87. Defendants' motion was denied after a full hearing. Defendants Health Care and Retirement Corporation of America, LLC and Heartland Employment Services, LLC did not make a motion for directed verdict.

6. Defendants presented testimony and evidence from Kim Smith; Sara Jones; Theresa Vogelpohl; David Goldberg, M.D.; and Leroy Booth, before resting their case on Thursday, August 4, 2011.

7. None of the Defendants moved for judgment as a matter of law at the close of the evidence. *See* Trial Transcript at Day 10 pages 1-13.

8. The Court properly charged the jury with a punitive damage instruction submitted by the Plaintiff with amendments proposed by the Defendants. *See* Trial Transcript at Day 9 pages 253-266.

9. Counsel presented closing arguments with only one objection noted.

10. The jury was presented a verdict form which included punitive damages. Counsel for Defendants requested that all four corporate defendants be consolidated on the verdict form for purposes of punitive damages. *See* Trial Transcript at Day 9 pages 301-305.

11. The jury retired to deliberate, and following deliberations, announced that they had agreed upon a verdict, which was returned as follows:

We, the jury, return the following verdict:

Do you find that Plaintiff proved by a preponderance of the evidence that there were violations or deprivations of the West Virginia Nursing Home Act on the part of the Defendants that substantially contributed to injury to Dorothy Douglas? **Yes.**

What are the amount of damages as a result of the Defendants' violations or deprivations of the West Virginia Nursing Home Act? **\$1,500,000.00**

Do you find that Plaintiff proved by a preponderance of the evidence that there was negligence on the part of the Defendants that substantially contributed to the death of Dorothy Douglas? **Yes.**

What percentage of the Defendants' conduct that caused the death of Dorothy Douglas was medical negligence as compared to non-medical negligence (the total of these two should equal 100%)
Ordinary Negligence 80%; Medical Negligence 20%

What amount of compensatory damages do you find Defendants must pay to Dorothy Douglas' children, Tom Douglas and Carolyn A. Douglas Hoy, for their sorrow, mental anguish, and solace which may include society, companionship, and comfort, individually? **Tom Douglas and Carolyn A. Douglas Hoy \$5,000,000.00**

Do you find that Plaintiff proved, by a preponderance of the evidence, that there were breaches of their fiduciary duty on the part of the Defendants that caused harm to Dorothy Douglas? **Yes.**

What amount of compensatory damages do you find Defendants must pay to the Estate of Dorothy Douglas for their breach? **\$5,000,000.00**

Under the circumstances of this case, state whether you find by the preponderance of the evidence that punitive damages are warranted against the Defendants:
Yes.

What is the total amount of punitive damages which you find by the preponderance of the evidence should be assessed against the Defendants?
\$80,000,000.00

12. The Verdict Form was signed by the foreperson. At the request of the Defendants, the Court polled the jury and found that all six (6) jurors were in favor of the verdict, and further, the Court found the verdict to be valid and proper and accepted the same as the verdict of the jury as to actual and punitive damages.

13. The Jury awarded the Plaintiff eighty million dollars (\$80,000,000.00) in punitive damages and eleven and a half million dollars (\$11,500,000.00) in compensatory damages. This calculates to approximately an 7:1 ratio.

14. The Court entered a *Judgment Order* on October 20, 2011.

15. The Court entered the *Order Denying Plaintiff's Motion to Alter or Amend Judgment Regarding the MPLA Noneconomic Cap on Damages* on January 9, 2012.

16. The HCR Manor Care Defendants filed *Defendants' Motion to Alter or Amend Judgment on Punitive Damages and Request for Hearing Pursuant to Garnes v. Fleming Landfill and Memorandum of Law* in support thereof (hereinafter referred to as "*Defendants' Garnes Motion*") on November 3, 2011.

17. Plaintiff filed *Plaintiff's Response to Defendants' Motion and Memorandum of Law in Support of Its Motion to Alter or Amend Judgment on Punitive Damages and Request for Hearing Pursuant to Garnes v. Fleming Landfill* (hereinafter referred to as "*Plaintiff's Garnes Response*") on November 18, 2011.

18. Plaintiff filed *Plaintiff's Supplemental Response to Motion to Alter or Amend Judgment on Punitive Damages and Request for Hearing Pursuant to Garnes v. Fleming Landfill* (hereinafter referred to as "*Plaintiff's Supplemental Garnes Response*") on June 20, 2012.

19. The HCR Manor Care Defendants filed *Defendants' Reply in Support of Its Motion to Alter or Amend Judgment on Punitive Damages and Request for Hearing Pursuant to Garnes v. Fleming Landfill* (hereinafter referred to as "*Defendants' Garnes Reply*") on April 24, 2012.

20. The HCR Manor Care Defendants filed *Defendant's Motion for Judgment as a Matter of Law, Or in the Alternative for a New Trial or in the Further Alternative for Remittitur and Memorandum of Law* in support thereof (hereinafter referred to as "*Defendants' New Trial Motion*") on November 3, 2011.

21. Plaintiff's filed *Plaintiff's Memorandum of Law in Response to Defendants' Motion for Judgment as a Matter of Law, Or in the Alternative for a New Trial or in the Further Alternative for Remittitur* (hereinafter referred to as "*Plaintiff's New Trial Response*") on November 18, 2011.

22. The HCR Manor Care Defendants filed *Defendants' Reply in Support of Their Motion for Judgment as a Matter of Law, Or in the Alternative for a New Trial or in the Further Alternative for Remittitur* (hereinafter referred to as "*Defendants' New Trial Reply*") on April 24, 2012.

23. A hearing was held on these matters on June 28, 2012 (hereinafter referred to as the "*Garnes Hearing Transcript*").

SUBSTANTIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW

The West Virginia Supreme Court recently synthesized the process for a trial court's review of a punitive damages award. *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815, Syl. Pt. 6 (2010). The trial court must first evaluate whether the evidence presented at trial justifies a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E.

58 (1895), and its progeny. If a punitive damage award is justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set forth in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870, Syl Pt. 5 (1992).

This Court is tasked with the responsibility to conduct a post-trial review of the punitive damage award and specifically set forth findings made under *Mayer*, *Garnes* and *TXO*. Each test requires a different type of post-trial review and each is addressed in turn. See *Punitive Damages Law in West Virginia*, Robin Jean Davis and Louis Palmer, Jr. (2010).

Preliminarily, the Defendants contend that each corporate defendant is entitled to an independent post-trial *Mayer* review regarding the sufficiency of the evidence, aggravating and mitigating factors under *Garnes* and *TXO* due process analysis. This request is problematic given the posture of the case and the defense strategy deployed by the Defendants.

The Plaintiff adduced sufficient evidence for the jury to conclude, and the Court finds that, all four Defendants operated the nursing home jointly: the nursing home license was issued to Health Care and Retirement Corporation of America, LLC; the nursing home staff was employed by Heartland Employment Services, LLC; the nursing home was managed by HCR Manor Care Services, Inc.; and Manor Care, Inc. owned and controlled each entity. Testimony was adduced at trial and Counsel for the Defendants conceded that these four corporations operated under the trade name "HCR Manor Care." Consistent with these findings of fact, the Court notes the following:

- (a) The HCR Manor Care Defendants were represented by a single corporate representative throughout the trial of this matter. Trial Day 1 (July 25, 2011) at p.42;
- (b) The HCR Manor Care Defendants voiced no objection during jury selection to having "just one strike, instead of one strike for each corporate defendant because they're all in the same family." Trial Day 1 (July 25, 2011) at p. 34;
- (c) The HCR Manor Care Defendants were jointly represented by the same counsel through trial who introduced themselves to the jury during opening statement as representing the "defendants in the case, Heartland of Charleston." Trial Day 2 (July 26, 2011) at p. 136;
- (d) The Human Resource Director for the nursing home testified that she was employed by "HCR Manor Care" although her paycheck came from Heartland Employment Services. Trial Day 4 (July 28, 2011) at p. 24;
- (e) Kathryn Hoops is the Vice-President and Director of Tax, Internal Audit and Risk Management for HCR Manor Care Services *and* Manor Care, Inc., and testified that Manor Care, Inc. and its subsidiaries are engaged in the business of "the operation of nursing homes" and Manor Care, Inc. "directly controls" its subsidiaries. Trial Day 5 (July 29, 2011) at p. 38;

- (f) Mark Wilson is the Regional Director of Operation for seven HCR Manor Care nursing homes including the West Virginia facility. Mr. Wilson testified he is “completely” responsible for the nursing homes in the Mid-Atlantic region including “clinical, financial, reporting outcomes, budget compliance, survey compliance or training or education.” Trial Day 7 (August 2, 2011) at p 64. Mr. Wilson expressly held himself out to the public as employed by HCR Manor Care (p. 65). Mr. Wilson is paid a bonus at the discretion of the Manor Care, Inc., President Paul Ormond (p. 69-70). Mr. Wilson was “responsible for the day to day operations” of the West Virginia nursing home involved in this litigation (p. 64);
- (g) David Parker is the General Manager/Vice President over Mid-Atlantic Division for Manor Care Inc. and is “responsible for the operation” of the West Virginia nursing home. Trial Day 3 (July 27, 2011) at p. 211. Mr. Parker reports directly to the COO of Manor Care, Inc. and all the Regional Directors of Operations, including Mark Wilson, report directly to him. *Id.* at 209-210. Mr. Parker holds monthly operational meetings with all Regional Directors of Operations, including Mark Wilson, to keep him informed of facility operation, resident care issues, and state surveys. *Id.* at 217-219. After Mr. Parker approves the budgets for the facility he presents the budgets to the COO for approval, this includes the budget for Heartland of Charleston. *Id.* at 225-227.

Moreover, the HCR Manor Care Defendants requested they be consolidated on the verdict form for purposes of punitive damages. Specifically, on Day 9 of trial, at 301-305 of the transcript, counsel for the HCR Manor Care Defendants argued:

We think that each defendant should be separated out and the jury should decide whether or not they're liable for punitive damages, yes or no. And then on the verdict form, there should be one line for all the punitive damage [...]. If the Court's inclined not to do that, then we want all of the defendants together with one line and the objection is on the record.

Counsel for the HCR Manor Care Defendants went on to argue:

If the Court's ruling is going to be if we separate out the defendants in terms of yes or no question about punitives and we're not entitled to have just one line for punitive total, then that's correct, we're going to take out the request to have them separated and that there will be one question for all the defendants and one line for all, any and all punitive damages.

Having adopted and followed this joint trial strategy, the HCR Manor Care Defendants are judicially estopped from separating the corporation during the post-trial review. *Riggs v. West Virginia University Hospitals, Inc.*, 221 W.Va. 646, 656 S.E.2d 91 (2007). The HCR Manor Care Defendants knew full well that its trial strategy meant that any of the four defendants could get “socked” a punitive damage award by the jury. See Trial Transcript at Day 9 page 304.

Accordingly, the Court will review of the punitive damage award against the HCR Manor Care Defendants in the same context as they represented themselves to the jury; namely, as joint defendants operating a nursing home under the same Manor Care “umbrella.”

Step One – Propriety of Punitive Damages Under *Mayer v. Frobe*²

The first step is to determine “whether the conduct of the defendant(s) toward the plaintiff entitled the plaintiff to a punitive damage award” under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895), and its progeny. The circumstances that warrant a punitive damage assessment by the jury have long been established in West Virginia:

In actions of tort, where gross fraud, malice,³ oppression, or wanton,⁴ willful,⁵ or reckless conduct⁶ or criminal indifference to civil obligations⁷ affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.

² Only two of the Defendants moved for judgment as a matter of law at the close of the Plaintiff’s case-in-chief and none at the close of the evidence. See WVRCP 50(a); *Montgomery v. Callison*, 226 W.Va. 296, 700 S.E.2d 507 (2010) (*per curiam*) (citing *Chambers v. Smith*, 157 W.Va. 77, 198 S.E.2d 806 (1973)). Some, if not all, of the Defendants have waived their right to challenge the sufficiency of the evidence which resulted in the award of punitive damages.

³ “[T]he punitive damages definition of malice has grown to include not only mean-spirited conduct, but also extremely negligent conduct that is likely to cause serious harm.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 474, 419 S.E.2d 870, 887 (1992), *aff’d*, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993); see also *Peters v. Rivers Edge Mtn., Inc.*, 224 W.Va. 160, 190, 680 S.E.2d 791, 821 (2009) (“The foundation of an inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular individual.”)

⁴ “Wanton” misconduct is defined as “reckless indifference to the consequences of an act or omission, where the party acting or failing to act is conscious of his conduct and, without any actual intent to injure, is aware, from his knowledge of existing circumstances and conditions, that his conduct will inevitably or probably result in injury to another.” *Stone v. Rudolph*, 127 W.Va. 335 3, 2 S.E.2d 742, 748 (1944).

⁵ “Willful” misconduct means more than negligence and carries the idea of deliberation and intentional wrongdoing. Willful misconduct includes all conscious or intentional violations of definite law or rules of conduct, as distinguished from inadvertent, unconscious, or involuntary violations. *State v. Saunders*, 219 W.Va. 570, 576, 638 S.E.2d 173, 179 (2006).

⁶ The usual meaning assigned to “willful,” “wanton” or “reckless” is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow, and it has been said that this is indispensable. *Cline v. Joy Mfg. Co.*, 172 W.Va. 769, 772 n. 6, 310 S.E.2d 835, 838 n. 6 (1983) (quoting W. Prosser, *Handbook of the Law of Torts* 185 (4th Ed.1971)).

⁷ The “criminal indifference to civil obligations” basis for awarding punitive damages refers to criminal conduct by a defendant that resulted in harm to the plaintiff. See *McChung v. Marion County Comm’n*, 178 W. Va. 444, 452, 360 S.E.2d 221, 229 (1987) (“[O]ne of the infrequently encountered factors supporting an award of punitive damages [is] unprosecuted criminal conduct[.]”).

Mayer v. Frobe, 40 W. Va. 246, 22 S.E. 58, Syl. Pt. 4 (1895). Specifically relevant to this matter, the West Virginia legislature authorizes punitive damages in the West Virginia NURSING HOME ACT, W. Va. Code § 16-5C-15(c) [1997] (“[W]here the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, punitive damages may be assessed.”).

The HCR Manor Care Defendants contend that the evidence was insufficient⁸ to establish its conduct warranted consideration of punitive damages by the jury under *Mayer*. See *Defendants’ Garnes Motion* at pp. 2-4 (“...the Defendants acted with the upmost regard to patient safety.”); *Defendants’ Garnes Reply* at p. 2 (Defendants’ made “...every reasonable attempt to provide Dorothy Douglas with the highest degree of care.”); *Defendants’ New Trial Motion* at p. 47; *Defendants’ New Trial Reply* at p. 26 (Plaintiff’s evidence on punitive damages was “exceedingly weak.”); and *Garnes Hearing Transcript* at pp. 157-63.

The Court disagrees. The Court finds there is ample evidence to support an award of punitive damages against the HCR Manor Care Defendants. Specifically, the Court notes that the evidence adduced at trial was sufficient for the jury to conclude that:

- (a) Dorothy Douglas was an incapacitated resident of the nursing home operated jointly by the HCR Manor Care Defendants;
- (b) Dorothy Douglas was neglected⁹ over a period of 19 days at the nursing home which resulted in her death by dehydration;
- (c) The neglect was perpetrated by the nursing home staff employed by the HCR Manor Care Defendants;
- (d) The HCR Manor Care Defendants were aware that chronic short-staffing of its nursing homes jeopardized the health and safety of its residents;
- (e) The HCR Manor Care Defendants intentionally acted with a disregard to a known risk with the high probability that harm would result from the neglect of incapacitated residents of its nursing home;
- (f) The HCR Manor Care Defendants possessed actual knowledge of its understaffed nursing home and the risks attendant to its conduct; and

⁸ See *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593, Syl. Pt. 5 (1983) (“In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party’s evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.”)

⁹ “Neglect” can be defined as “the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.” W. Va. Code § 61-2-29 [2009].

- (g) The HCR Manor Care Defendants were placed on notice of neglect in its nursing home by residents, resident families, staff and state regulators but failed to take appropriate action.

Neglect of an incapacitated resident of a nursing home, which results in death by dehydration, over a span of 19 days, is conduct which is sufficient to justify an award of punitive damages under West Virginia law. Moreover, actual knowledge of systemic neglect in a nursing home, over a period of months or years, rises to the level of intentional, wanton, willful and reckless conduct. The HCR Manor Care Defendants engaged in a reckless disregard for the lawful rights of its nursing home residents which resulted in the wrongful death of Dorothy Douglas. The evidence presented at trial is consistent with and justifies an award of punitive damages under the *Mayer* test and W. Va. Code § 16-5C-15(c).

Step Two – Aggravating And Mitigating Criteria Set Out In *Garnes*

The second step is to examine the amount of the punitive damage award pursuant to the *aggravating* and *mitigating* criteria set out in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). The *Perrine* Court recently grouped these factors according to their purpose and set forth a synthesized outline for the trial court to follow. *Perrine*, Syl. Pt. 7.

When a trial or appellate court reviews an award of punitive damages for excessiveness under Syllabus points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), the court should first determine whether the amount of the punitive damages award is justified by *aggravating* evidence including, but not limited to: (1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant; (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff.

The court should then consider whether a reduction in the amount of the punitive damages should be permitted due to *mitigating* evidence including, but not limited to: (1) whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct; (2) whether punitive damages bear a reasonable relationship to compensatory damages; (3) the cost of litigation to the defendant; (4) any criminal sanctions imposed on the defendant for his conduct; (5) any other civil actions against the same defendant based upon the same conduct; (6) relevant information that was not available to the jury because it was unduly prejudicial to the defendant; and (7) additional relevant evidence. *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815, Syl. Pt. 7 (2010).

The *Garnes* factors are interactive and must be considered as a whole when reviewing punitive damages awards." *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 554, 694 S.E.2d 815, 887 (2010); *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W.Va. 457, 474, 419 S.E.2d 870, 887.

A. ***Garnes* Aggravating Factors:** The Court is first tasked with determining whether the

amount of the punitive damages award is justified by *aggravating* evidence. The Court is provided with five general categories of *Garnes* aggravating factors to consider. Each is addressed in turn.

1. *Garnes* aggravating factor: The Defendants engaged in reprehensible conduct. The first factor to be considered is the reprehensibility of the conduct. The HCR Manor Care Defendants' deny that it engaged in reprehensible conduct. See *Defendants' Garnes Motion* at pp. 5-8; *Defendants' Garnes Reply* at pp.8-10; and *Garnes Hearing Transcript* at pp. 168-69. The Court disagrees.

The Court finds that there is sufficient evidence for the jury to conclude the HCR Manor Care Defendants knowingly engaged in an intentional and malicious course of conduct resulting in the neglect of Dorothy Douglas. Such neglect proximately resulted in her death by dehydration. Neglect of an incapacitated adult is *per se* reprehensible. See *State v. Bull*, 204 W.Va. 255, 263 (1998) (holding that neglect and abuse of an incapacitated adult is *reprehensible* conduct that is subject to criminal prosecution and penalty).

The conduct by the HCR Manor Care Defendants is reprehensible because it was not an isolated event. There was sufficient evidence presented at trial to establish Dorothy Douglas was neglected throughout her 19 day ordeal at Heartland of Charleston. Dorothy Douglas became immobile, fell, suffered significant head trauma, developed sores in her mouth for which the dead tissue had to be scraped away with a scalpel, suffered bruises and sores on her body, and was so depleted of water that she became dehydrated and died.

The conduct by the HCR Manor Care Defendants is reprehensible because the neglect was systemic, repetitive and effected other residents as well. The Plaintiff presented evidence of a survey dated April 29, 2009, months before the residency of Dorothy Douglas, conducted by state regulators which cited the West Virginia nursing home for failure to "consistently deploy sufficient nursing staff across all shifts and units to meet the assessed needs of dependent residents." The survey revealed confidential interviews from staff, residents and family members who "verbally reported the inability to get even the basic care completed during times when the facility was short staffed with nursing assistants most notably on weekends." See Plaintiff's Trial Exhibit "20". Mark Wilson, Manor Care Regional Director of Operations (for seven HCR Manor Care nursing homes in West Virginia, including Heartland of Charleston) testified that he was aware of the survey results prior to the admission of Dorothy Douglas and "knew it was a problem." Trial Day 7 (August 2, 2011) at p. 92.

Furthermore, the Plaintiff adduced evidence at trial sufficient for a jury to determine the conduct was reprehensible. Specifically, the Court notes the following:

- (a) An HCR Manor Care nursing staff member (Tara Bowles), assigned to attend Dorothy Douglas, described the conditions in the nursing home as "horrible" and "unbearable." Trial Day 2 (July 26, 2011) at pp. 183, 189. She testified that "there's too many patients for us to take care of by ourselves" and patients would lay in their urine and feces for hours. *Id.* at 183, 189-190. She admitted that she and the rest of the staff "couldn't take care of the patients the way we should have." *Id.* at 196.

She testified: "I wouldn't put my dog there." *Id.* at 202;

- (b) An HCR Manor Care nursing staff supervisor (Beverly Crawford), who also attended Dorothy Douglas, testified the patients "weren't given the proper care that they deserved." Trial Day 3 (July 27, 2011) at p. 45. She testified that she reported resident neglect to the HCR Manor Care administrator who "yelled" at her for documenting patient neglect and removed the report from the books. *Id.* at 47, 61-62. She accused the HCR Manor Care administrator of covering up the incident and testified the policy was "You report something; you get fired." *Id.* at p. 63;
- (c) A registered nurse (Paula Langston) from another facility (Heritage) testified that she provided care for Dorothy Douglas the morning after she was transferred from HCR Manor Care and that, in her opinion, Dorothy appeared to have been a victim of neglect. Trial Day 3 (July 27, 2011) at p. 161;
- (d) An HCR Manor Care human resource director (Devon Revels) testified that she complained to regional management about the West Virginia nursing home staff being short-staffed, overworked and underpaid and requested permission to bring in additional staff. The request was repeatedly denied. Trial Day 4 (July 27, 2011) at p. 16-17. That this work environment cause great that a 100% turnover rate in the nursing department. *See Plaintiff's Trial Exhibit "7"*;
- (e) The HCR Manor Care Defendants actively concealed and covered-up their misconduct prior to the death of Dorothy Douglas. The Plaintiff adduced evidence at trial that the Defendants intentionally altered data and attempted to cover up their systemic staffing problems from West Virginia regulators. This intentional conduct includes: (1) falsifying staffing schedules (*See Trial Testimony of Mark Wilson day 7 pages 103-104*); (2) intentionally miscalculating nursing hours (*See Trial Transcript, Testimony of Mark Wilson, Day 8, pages 59-62*); (3) destruction of written complaints of neglect (*See Trial Transcript, Testimony of Beverly Crawford, Day 3, pages 46-47, lines 11-22, 1-13*); (4) reprimanding employees for documenting neglect (*See Trial Transcript, Testimony of Beverly Crawford, Day 3, pages 46-47, lines 11-22, 1-13*); and (5) increasing the number of staff during State inspections (*See Trial Transcript, Testimony of Tara Bowles, Day 2, pages 189-191*); and
- (f) The HCR Manor Care Defendants acknowledged to state regulators, prior to Dorothy Douglas' admission, that the West Virginia nursing home, particularly the second floor, was understaffed approximately 46% of the time. Dorothy Douglas was a resident of the second floor. The nursing staff testified the facility was actually short-staffed 99% of the time. Trial Day 2 (July 26, 2011) at p. 213. The nursing home administrator testified that he was aware staffing falling below state minimums on occasion. Trial Day 6 (August 1, 2011) at p. 67. Despite acknowledging the problem, the nursing home was still short-staffed during the residency of Dorothy Douglas.

The Court finds there is ample evidence to support a finding that the HCR Manor Care Defendants engaged in reprehensible conduct which substantially contributed to and was a proximate cause of the death of Dorothy Douglas.

(2) **Garnes aggravating factor: Defendants Directly Profited from the Wrongful Conduct.** The second *Garnes* aggravating factor is to consider whether the Defendants profited from its wrongful conduct. The HCR Manor Care Defendants argue they did not profit from its alleged misconduct. See *Defendants' Garnes Motion* at pp. 8-9; *Defendants' Garnes Reply* at pp.10; and *Garnes Hearing Transcript* at pp. 168-69. The Court disagrees.

The Court finds there is sufficient evidence adduced at trial for the jury to conclude that the short-staffing of the nursing home was directly related to corporate profits. The Plaintiff presented evidence at trial that staffing is the largest expenditure in the nursing home industry. Trial Day 6 (August 1, 2011) at p. 63. Devon Revels testified that she repeatedly requested authority to hire more paid staff and agency employees. The request was refused because of the increased expense. The Plaintiff presented sufficient evidence for the jury to conclude that the reprehensible conduct of the HCR Manor Care Defendants was motivated by corporate profits.

The HCR Manor Care Defendants submitted various financial information during the post-trial hearings to establish the punitive damage award "effectively wipes out" the profit of over 500 HCR Manor Care nursing homes (*Defendants' Garnes Reply* at pp.10). The HCR Manor Care Defendants argue the punitive damage award wipes out "all equity" of seven West Virginia nursing homes (*Defendants' Garnes Motion* at p. 9), represents 26 years worth of all the income of all the West Virginia nursing homes (*Garnes Hearing Transcript* at p. 239) or four times (4x) the combined equity of the West Virginia buildings owned by the HCR Manor Care Defendants (*Garnes Hearing Transcript* at p. 241), and suggests the award may bankrupt (*Garnes Hearing Transcript* at p. 169) and destroy the Defendants (*Garnes Hearing Transcript* at p. 169). The HCR Manor Care Defendants argue it is manifestly unjust to "extract" 6.67% of its net worth countrywide for a single event occurring at one facility. *Defendants' Garnes Motion* at p. 11.

The Court specifically asked counsel whether this evidentiary proffer was intended to demonstrate the inability by the HCR Manor Care Defendants to pay the punitive damage award. Counsel tactfully avoided an answer to the question. (*Garnes Hearing Transcript* at p. 119-20). Plaintiff responded by referencing evidence in the record that the HCR Manor Care Defendants purchased \$125 million in liability insurance. There is no coverage dispute and no reservation of rights. See *Order Denying Plaintiff's Motion to Alter or Amend Judgment Regarding the MPLA Noneconomic Cap on Damages* entered on January 9, 2012. The insurance policies were submitted of record and the Court takes judicial notice, with no exception taken by the Defendants, that the insurance policies expressly provide coverage for punitive damages. See *Garnes Hearing Transcript* at pp. 114-20. So, in reality, this verdict will not "wipe out" the Defendants financially. The only economic cost to the HCR Manor Care Defendants adduced in the post-trial review is a potential, un-quantified increase in future insurance premiums. See *Garnes Hearing Transcript* at pp. 251-59.

(3) **Garnes aggravating factor: The Defendants operate a multi-billion**

dollar business. The third *Garnes* aggravating factor gives consideration to the financial wealth of the Defendants. The HCR Manor Care Defendants assign error to the use of the Manor Care, Inc. tax return and argue, for the first time post-trial, that only Heartland of Charleston's financial information should have been introduced at trial.¹⁰ See *Defendants' Garnes Motion* at pp. 9-11; *Defendants' Garnes Reply* at p. 11; and *Garnes Hearing Transcript* at pp. 232-41.

This position is untenable for several reasons. First the HCR Manor Care Defendants did not object at trial to the introduction of the consolidated tax return on the basis it was the wrong information to use, but only that the tax return was unduly prejudicial. See *Transcript* day 8 pp. 70, 87. Nor did the HCR Manor Care Defendants introduce evidence of separate tax returns for each of the four corporate defendants.¹¹ Second, due to the HCR Manor Care Defendants' decision to try this matter as a singular entity and to consolidate all of the Defendants in a singular punitive damages award, placing into evidence the financial worth of each Defendant would have been redundant to that encompassed in the consolidated return for Manor Care, Inc. Finally as recognized in *TXO*: "It is the management of USX that must ultimately make the decision that its employees will not engage in malicious and nefarious business activities, and, therefore, it is the pocketbook of USX that the jury verdict must reach." *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W.Va. 457, 477, 419 S.E.2d 870, 890. The Court finds the "operator calling the shots" was Manor Care, Inc.

The HCR Manor Care Defendants agreed during the jury charge that they wanted all of the Defendants on a single line. Manor Care, Inc. disclosed the 2009 consolidated tax return for trial record¹² which evidences \$4,085,072,446.00 in total revenue, total assets of \$7,917,892,414.00 and a net profit of \$75,263,092.00. HCR Manor Care Regional Director of Operations, Mark Wilson, testified that the HCR Manor Care Defendants employ "nearly 60,000 employees working in over 500 locations nationwide." Trial Day 7 (August 2, 2011) at p. 69.

The HCR Manor Care Defendants hold a \$4 billion share of the annual nursing home

¹⁰ The Court takes judicial notice that the financial information for Heartland of Charleston was not produced until post-trial.

¹¹ The HCR Manor Care Defendants claim the profitability of the individual facility, Heartland of Charleston, should have been the financial information provided to the jury. The HCR Manor Care Defendants never provided financial information for the individual nursing home, Heartland of Charleston, prior to trial, nor did the HCR Manor Care Defendants move during trial to admit this evidence. The Court also recognizes after reviewing the financial information the HCR Manor Care Defendant submitted to the Court *in camera* on day one (1) of trial (See Plaintiff's Notice of Filing filed on June 25, 2012, exhibit "C") that this production contained no financial information for Health Care & Retirement Corporation of America LLC, the Defendant that holds the license to operated Heartland of Charleston. Additionally, Katherine Hoops testified on day 7 page 50 that the sole member of Health Care & Retirement Corporation of America LLC is Manor Care, Inc. Consistent with *TXO Production Corp. v. Alliance Resources Corp.* 187 W.Va. 457 at 477, the HCR Manor Care Defendants cannot be less than forthcoming during discovery and then claim foul when the Plaintiff has to use the only information available to them at trial.

¹² It should be noted that the Manor Care Defendants assign error in the introduction of the consolidated tax return at trial. As discussed, *infra*, the HCR Manor Care Defendants opted to consolidate the four corporate defendants for purposes of punitive damages on the verdict form. Introduction of the consolidated tax returns was appropriate. Furthermore, the HCR Manor Care Defendants did not proffer, nor disclose, individual financials for the facility until post-trial. Consistent with *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457 at 477, the Manor Care Defendants cannot stonewall discovery and then claim foul when the Plaintiff introduces the only information available to them at trial.

market and report nearly \$8 billion in assets. The HCR Manor Care Defendants reported a net operating profit of \$75 million in 2009 alone. Given the HCR Manor Care Defendants' size and resources, a large punitive damage award is reasonable and required to serve the purpose of punitive damages¹³.

While the wealth of a defendant(s) cannot justify an unconstitutional punitive damages award, the award in this case is not unconstitutional or excessive. Indeed, to accomplish punishment and deterrence for such a wealthy company, a punitive damage award must necessarily be large. *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 555, 694 S.E.2d 815, 888 (2010). This is particularly true when the "punishment" aspect of a punitive damage award is offset by the presence of \$125 million in punitive damage insurance. This verdict sends a clear "deterrence" message to a multi-billion dollar nursing home corporation that its misconduct will not be tolerated in West Virginia.

(4) *Garnes* aggravating factor: This Punitive Verdict will Encourage Fair and Reasonable Settlements. The fourth *Garnes* aggravating factor is whether the punitive damage award is appropriate to encourage fair and reasonable settlements when a clear wrong has been committed. The HCR Manor Care Defendants argue they offered to settle this matter for a "reasonable amount" and that they have settled 27 lawsuits totaling \$13 million evidencing a "willingness" to settle nursing home claims. See *Defendants' Garnes Motion* at pp. 11-12; *Defendants' Garnes Reply* at pp. 11-12; and *Garnes Hearing Transcript* at pp. 168-69.

The parties proffered various versions of the settlement negotiations during the instant matter. The record indicates the HCR Manor Care Defendants offered to settle this wrongful death claim for \$150,000 at mediation and raised its offer to \$500,000 sometime before trial. The record also reflects the HCR Manor Care Defendants have spent over \$1.1 million in litigation defenses. *Garnes Hearing Transcript* at p. 230.

The documents submitted to the Court indicate the HCR Manor Care Defendants spent nearly \$10 million defending \$13 million in claims. The record reveals the Defendants are willing to spend as much money defending claims as settling claims. Such a business decision does not evidence a willingness to settle claims when a clear wrong has been done. In fact, spending \$10 million defending \$13 million in claims evidences the opposite; to wit, the HCR Manor Care Defendants will spend nearly as much money defending claims as settling claims, even though a clear wrong has been done.

The Court finds that this punitive damage award will *encourage* the HCR Manor Care Defendants' to reconsider its defense tactics of deny and defend when a clear wrong has been committed.

(5) *Garnes* aggravating factor: This Litigation was Very Costly to the Plaintiff. The Plaintiff expended in excess of \$200,000 in litigation costs and devoted countless hours of attorney time to bring this case to trial. Prosecuting this case requires a plaintiff to retain a lawyer capable of financing the litigation costs on a contingency fee contract. Otherwise, very few West Virginians could afford to bring the HCR Manor Care Defendants to justice for the

¹³ To use an analogy from *TXO*, these Defendants are McDonald's and not Jeff's Neighborhood Hot Dog Stand.

neglect and wrongful death of a family member. It should be noted that the cost of bringing this case to trial exceeded the last offer made by the HCR Manor Care Defendants at mediation. The cost of litigation to the Plaintiff justifies this award of punitive damages.

B. *Garnes* Mitigating Factors: The court is also tasked with consideration of whether a reduction in the amount of the punitive damages should be permitted due to *mitigating* evidence. The Court is provided with seven general *Garnes* mitigating factors to consider. Each is addressed in turn.

1. ***Garnes* mitigating factor: Neglect of an incapacitated resident in a nursing home is a grievous harm.** The first mitigating *Garnes* factor is consideration of whether the punitive damages bear a reasonable relationship to the harm that is likely to occur and/or has occurred as a result of the defendant's conduct. The HCR Manor Care Defendants all but concede this factor. *See Defendants' Garnes Motion* at pp. 14-15; *Defendants' Garnes Reply* at p. 13.

The "harm" to Dorothy Douglas was death by dehydration. It could be said there is no greater harm than the cost of a life. In this instance, the harm that is likely to occur as a result of systemic neglect of an incapacitated nursing home resident is grievous and merits a substantial punitive damage award.

Many nursing home residents, like Dorothy Douglas, are incapacitated and unable to perform basic life functions such as feeding, bathing and toileting. This is the very reason families sometimes entrust an incapacitated family member to a nursing home facility. Chronic short-staffing results in neglect. Neglect of an incapacitated nursing home resident can lead to death. In the case of Dorothy Douglas, the conduct by the Defendants resulted in death by dehydration.

Whether an award of \$80 million dollars bears a reasonable relationship with the harm suffered by Dorothy Douglas is a morbid and macabre task. Certainly, the death of Dorothy Douglas occurred under horrendous circumstances. The Court considers death by dehydration a cruel act of injustice. The value of human life is left to the sound discretion of the jury. The Court is mindful of the forbidden "golden rule" during closing arguments. The Court, however, is not so constricted when reviewing the reasonableness of a punitive damage award. It can hardly be said that any man, or woman, would accept an award of compensatory damages or punitive damages, such as returned by the jury in the instant case, in exchange for the suffering of a slow and agonizing death by dehydration.

Defendants' concede as much in their memorandum of law by addressing only two paragraphs to the issue. Defendants' express "remorse" and respectfully refuse to "downplay the loss suffered by Ms. Douglas." Defendants merely argue the punitive damage award "is wholly excessive in light of the circumstances of this case." Memo at p.15. The first *Garnes* factor does not militate in favor of reducing the punitive damage award.

(2) ***Garnes* mitigating factor: There is a reasonable relationship between \$11.5 million in compensatory damages and \$80 million in punitive damages.** The second

mitigating *Garnes* factor is whether the punitive damages bear a reasonable relationship to compensatory damages. This factor is closely related to the *TXO* due process test. Most recently, this factor was discussed in *Peters v. Rivers Edge Min., Inc., infra*, wherein the West Virginia Supreme Court noted that a "reasonable relationship" is most likely found in regard to "single-digit multipliers" but "[t]he precise award in any case ... must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* at 825.

The HCR Manor Care Defendants argue that the duplicative compensatory damages create an "artificially high anchor" upon which the punitive damage award is measured. *See Defendants' Garnes Motion* at pp. 14; *Defendants' Garnes Reply* at pp. 12-13. The Court has upheld the compensatory verdict recorded in the *Judgment Order*. Therefore, the HCR Manor Care Defendants' argument in this regard is moot.

This Court finds the punitive damages bear a "reasonable relationship" with compensatory damages in this wrongful death action. In the instant case, the jury awarded a single digit multiplier of punitive damages to compensatory damages of approximately seven-to-one (7:1 ratio). Such a ratio comports with a "single-digit ratio" according to the *Garnes* factor. It should be noted, however, that no West Virginia case has ever found that a punitive damage award fails to bear a reasonable relationship to compensatory damages in the context of a wrongful death action. *See generally Radee, Inc. v. Mountaineer Coal Co.*, 210 W.Va. 1, 552 S.E.2d 377 (2000) (upholding 17:1 ratio); *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 490 S.E.2d 678 (1997) (15:1 ratio); *Horan v. Turnpike Ford, Inc.*, 189 W.Va. 621, 433 S.E.2d 559 (1993) (8:1 ratio).

(3) ***Garnes* mitigating factor:** The costs of litigation to the Defendants is not a mitigating factor in the instant case; to the contrary, it is an aggravating factor. The third mitigating *Garnes* factor is the cost of litigation to the defendant. The HCR Manor Care Defendants proffered testimony at the *Garnes* hearing that they have expended "a little over 1.1 million dollars" defending this matter. *Garnes Hearing Transcript* at p. 230; *Defendants' Garnes Motion* at p. 15; *Defendants' Garnes Reply* at pp. 14.

There are circumstances wherein the cost of litigation properly serves as a mitigating factor and should serve as a setoff for a punitive damage award. This is not one of those cases. The HCR Manor Care Defendants marshaled its vast financial resources and defended this matter through verdict. The Manor Care Defendants have made no showing of why the enormous defense costs should serve as a setoff; nor how such a setoff supports the public policy of punitive damages.

(4) ***Garnes* mitigating factor:** Criminal Sanction Imposed on the Defendants. The fourth mitigating *Garnes* factor is whether any criminal sanctions were imposed on the defendant for his conduct. The HCR Manor Care Defendants did not incur criminal sanctions for their conduct in this matter and concede this mitigating factor is moot and inapplicable. *See Defendants' Garnes Motion* at p. 16; *Defendants' Garnes Reply* at pp. 14.

The imposition of criminal sanctions may duplicate punitive damages in certain circumstances. However, the absence of criminal sanctions can also serve as a basis for punitive

damages. See *McClung v. Marion County Comm'n*, 178 W.Va 444, 452 (1987) (Criminal conduct warranting punishment often escapes the notice or interest of the public prosecutor. Citizens faced with an under-zealous prosecutor should not be left without avenue for redress of injuries, particularly in light of our case law which recognizes that punitive damages serve to vindicate the victims of the defendant's wrongful conduct and provide a substitute for personal revenge).

West Virginia law imposes significant criminal penalties for the abuse and neglect of incapacitated adults. See W.Va. Code §61-2-29 (defining "neglect" as "unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult.") Unprosecuted criminal conduct is a factor supporting an award of punitive damages. Plaintiffs adduced at trial evidence that suggests unprosecuted criminal conduct related to the death of Dorothy Douglas.

(5) **Garnes mitigating factor: Other Civil Actions Against the Same Defendant.** The fifth mitigating *Garnes* factor considers other civil actions against the same defendant based upon the same conduct. This factor is most germane to multi-plaintiff litigation such as *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010). This factor has limited relevance to the wrongful death case of Dorothy Douglas.

The HCR Manor Care Defendants attempt to mitigate the punitive damage award by pointing to other lawsuits filed by West Virginia nursing home residents. See *Defendants' Garnes Motion* at pp. 16-17; *Defendants' Garnes Reply* at p. 14; and *Garnes Hearing Transcript* at pp. 227-32. However, the Defendants were unable to establish whether the lawsuits arose out of the same conduct. *Garnes Hearing Transcript* at pp. 250-51.¹⁴

The HCR Manor Care Defendants have failed to proffer any evidence that it has been sued, let alone settled, for elderly neglect or intentional short-staffing of its nursing homes. No proffer has been made of any punitive damage award to "retire" the reprehensible conduct presented to the jury. There has been no "double punishment" to justify the mitigation of this punitive damage award due to other similar lawsuits.

(6) **Garnes mitigating factor: Relevant Information That Was Not Available to the Jury.** The sixth mitigating *Garnes* factor considers relevant information that was not available to the jury because it was unduly prejudicial to the defendant. The HCR Manor Care Defendants did not address this mitigating factor and the same is considered waived.

(7) **Garnes mitigating factor: Additional Relevant Evidence.** The seventh (and final) mitigating *Garnes* factor is a catch-all for "additional relevant evidence." The HCR Manor Care Defendants presented evidence to the Court regarding its efforts to monitor abuse and neglect in its facilities as a mitigating factor. See *Defendants' Garnes Motion* at pp. 17-20; *Defendants' Garnes Reply* at p. 14-15; and *Garnes Hearing Transcript* at pp. 174-213.

¹⁴ David Parker, General Manager/Vice President, for the Manor Care Defendants testified that he could not provide any information as to whether these other claims were based on the same allegations or similar conduct as the facts in this matter.

However, none of the programs are subsequent remedial measures. Each program was in place well before the events leading to the wrongful death of Dorothy Douglas. *Garnes Hearing Transcript* at p. 208. None of the programs evidence an effort or intention to address the systemic neglect which led to the wrongful death of Dorothy Douglas. *Garnes Hearing Transcript* at p. 213. The HCR Manor Care Defendants provided absolutely no evidence that they have done anything to address the systemic staffing problem at Heartland of Charleston. This is in contrast to *Perrine* where DuPont demonstrated to the Court that it had spent approximately \$20 million for the remediation of the Spelter smelter site for which they were sued. There has been no such showing here.

During the course of the *Garnes* hearing, the Defendants argued and presented evidence in favor of mitigation. A corporate employee of the Defendants, Monica Helwig, was called to testify regarding programs, clinical practices and guidelines in place during 2009. Some of this evidence discussed by Ms. Helwig was introduced during the trial of this matter. It is also clear from the evidence at trial that these programs, clinical practices and guidelines were insufficient to prevent neglect and abuse. As Ms. Helwig was not involved with the operation of Heartland of Charleston during Mrs. Douglas' residency, she could not testify to the conditions or staffing issues during 2009. She testified that she was unaware of any changes that had taken place in the operations of nursing homes by the Defendants as a result of the Douglas trial. As such, the Court finds that this testimony is insufficient to warrant mitigation pursuant to *Garnes*.

The Defendants were permitted to proffer the testimony of another corporate employee, David Parker, in favor of mitigation. Mr. Parker's proffered testimony revolved around nine (9) exhibits that were tendered to the Court to support the Defendants' argument for mitigation. The Court had determined and ruled that Mr. Parker's testimony was not necessary in that the documents could speak for themselves. Exhibits 6-9 were financial exhibits that were created by the Defendants presumably for purposes of the *Garnes* hearing. Exhibits 6-9 were available to the Defendants during the trial of this matter but were not produced in discovery or admitted into evidence at trial. Although Mr. Parker was present at trial, he did not testify regarding any of the financial exhibits during trial. The financial evidence was available solely to the Defendants before and during the trial. The Defendants chose not to disclose the financial information to the Plaintiff and chose not to admit or argue it at trial. Exhibits 6-9 were created by the Defendants and not produced to the Plaintiff prior to trial, during trial, or even prior to the *Garnes* hearing. As such, the veracity of the documents has not been tested by Plaintiff's counsel. The Court declines to rely on such evidence for purposes of mitigation. Even if the Court were to consider the financial exhibits produced and admitted for the first time at the *Garnes* hearing, the Court finds that the information contained within does not warrant mitigation pursuant to *Garnes*.

The additional exhibits relied on by the Defendants relate in part to other claims/lawsuits. There was no evidence as to the allegations in the other lawsuits and specifically whether the allegations in the other cases were similar to those made by the Plaintiff in this case. As such, the Court is unable to rely on the mere presence of other lawsuits for mitigation under the *Garnes* factors.

C. The Punitive Damages Comply Compensatory/Punitive Damage Ratio Established in *TXO*

Having reviewed the aggravating and mitigating circumstances under *Garnes*, the court now considers whether the punitive damage award is within the constitutional boundaries set by *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992).

The *TXO* Court observed that, “[a]lthough there is no mechanical mathematical formula to use in all punitive damages cases, we think it appropriate here to offer some broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages.” 187 W.Va. at 474, 419 S.E.2d at 887. The *TXO* Court held that:

The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.

Syl. pt. 15, *TXO*; *see also Rader, Inc. v. Mountaineer Coal Development Co.*, 210 W.Va. at 12, 552 S.E.2d at 388 (approving 17:1 ratio where defendant’s conduct was “evil and self-serving”). In fact, the West Virginia Supreme Court recognizes that in cases where the defendant has intentionally committed mean-spirited and harmful acts (especially when the provable compensatory damages are small, but the potential of harm is great), even punitive damages 500 times greater than compensatory damages are not per se unconstitutional. *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 476, 419 S.E.2d 870, 889 (1992) (emphasis added).

Recently, the West Virginia Supreme Court re-affirmed the *TXO* standard post-*Campbell* stating:

We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

In re Tobacco Litigation, 218 W.Va. 301, 305-306, 624 S.E.2d 738, 742 - 743 (W.Va. 2005). In the instant case, the jury awarded a single digit multiplier of punitive damages to compensatory damages of approximately seven-to-one (7:1 ratio).

The HCR Manor Care Defendants contend that, if the punitive damage award is not remitted on other grounds, the 7:1 ration is unconstitutionally excessive. *Defendants’ New Trial Motion* at pp. 59-65. The Court disagrees and finds that the 7:1 ratio comports with due process under *TXO*.

First, the Court has misgivings whether the HCR Manor Care Defendants have standing to assert an unconstitutional “taking” given the punitive damage award is covered by insurance.

Seltzer v. Morton, 154 P.3d 561 (Mont. 2007). The HCR Manor Care Defendants proffered to the Court a series of stacking insurance policies during the December 8, 2011 post-trial hearing. See Order Denying Plaintiff's Motion to Alter or Amend Judgment Regarding the MPLA Noneconomic Cap on Damages entered on May 4, 2012. These policies expressly provide coverage for punitive damages up to \$125 million. No case in West Virginia addresses the *Garnes* mitigating factors, nor the *TXO* ratio analysis, in the context of an insurance company indemnifying a tortfeasor for punitive damages. It is difficult to fathom how the HCR Manor Care Defendants have standing to assert a taking in violation of due process since an insurance company will be paying the entire verdict.

This begs the question of whether the punitive damage award still serves its public policy. In the absence of punishment, punitive damages serve other public policy purposes: deterring others from pursuing a similar course of conduct; providing additional compensation for the egregious conduct to which the plaintiff has been subjected; encouraging a plaintiff to bring an action where he or she might be discouraged by the cost of the action; acting as a substitute for personal revenge by the injured party; and encouraging good faith efforts at settlement.¹⁵ The Court finds that public policy is best served by imposing the punitive damage award intact because of the presence of punitive damage insurance. The Court finds there is no better way to address punitive damage insurance than to let the marketplace react to this punitive damage award.

Second, the Court finds the 7:1 ratio is appropriate in this wrongful death action because the HCR Manor Care Defendants acted with "evil intention" and *malice*. *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 190, 680 S.E.2d 791, 821 (2009) ("The foundation of an inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular individual"). Here, the evidence demonstrated that the HCR Manor Care Defendants had a "general disregard of the rights of others" which was apparent from its treatment of Dorothy Douglas throughout her residency in the nursing home. Evidence of malice presented at trial includes:

- (a) The HCR Manor Care Regional Director of Operations (including the West Virginia facility) testified that he knew short-staffing and not meeting residents needs "was a problem" before the admission of Dorothy Douglas. Trial Day 7 (August 2, 2011) at p. 92;
- (b) Sufficient evidence was presented at trial for the jury to conclude that the Defendants were put on notice and possessed actual knowledge of both State and Federal safety rule violations prior to the admission of Dorothy Douglas.
- (c) The HCR Manor Care administrator acknowledged prior complaints of resident neglect by staff, residents and family members;

¹⁵ See *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003); *Coleman v. Sopher*, 201 W. Va. 588, 499 S.E.2d 592 (1997); *Poling v. Motorists Mut. Ins. Co.*, 192 W. Va. 46, 450 S.E.2d 635 (1994); *Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S.E.2d 710 (1968).

(d) The trial court finds that the HCR Manor Care Defendants intentionally, and repeatedly, short-staffed the West Virginia nursing home prior to and during the residency of Dorothy Douglas for pecuniary gain.

All these factors lead to the unmistakable conclusion that the HCR Manor Care Defendants acted with intention and malice proximately causing the death of Dorothy Douglas. Therefore, the Court finds the punitive damage award in this matter is not unconstitutional per TXO.

Accordingly, for the reasons set forth above, the Court hereby DENIES Defendants' Motion. All of Plaintiff and Defendants' objections and exceptions are noted and preserved.

Entered this the 10th day of April, 2012.


Honorable Paul Zakaib

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 11
DAY OF April 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA