FILED
OCT 16 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0470

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),

Petitioners,

v.

Case No. 13-0470
(On Appeal from Kanawha County Circuit Court, Civil Action No. 10- C-952)

TOM DOUGLAS, INDIVIDUALLY and on behalf of the ESTATE OF DOROTHY DOUGLAS,

Respondents.

Petitioners' Reply Brief

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REPLY TO INTRODUCTORY SUMMARY

Petitioners/Defendants recognize that this is an end-of-life case and therefore sad. Defendants described the progression of events that led to Dorothy Douglas' death with fidelity to the medical records. *See* Petitioners' Brief 1-2. Respondents/Plaintiffs take liberties with respect to that record. *See* Plaintiffs' Response Brief 1-2. For example, Plaintiffs state that Ms. Douglas was "malnourished" at Heartland of Charleston. *Id.* at 1. Ms. Douglas did have a history of decreased appetite; before entering Heartland of Charleston, her weight had dropped 15 pounds in only six months. (J.A. 005241). But she consumed more food at Heartland nursing home ("Heartland") than she had consumed earlier at other institutions. *See* J.A. 008353 (consumed 21.66% of meals at Cabell Hospital from August 13 through August 29, 2008); J.A. 008393 (consumed 36.42% of meals at River Park Hospital from August 20 through September 3, 2009); and J.A.008456 (consumed 41.98% of meals at Heartland from September 5 through September 23, 2009).

Plaintiffs further assert that "Ms. Douglas died from severe dehydration." Pl. Br. 1. The death certificate concluded that the cause of her death was dementia. (J.A. 008460). Plaintiffs say Ms. Douglas died "[a]fter a few days in the hospital, and despite the efforts made there." Pl. Br. 1. The record shows that she passed after stays in the hospital and then a hospice, a full 18 days after she left Heartland. (J.A. 005238, 008477-78, 008460). As importantly, at Cabell Hospital, plaintiff Tom Douglas declined use of a feeding tube for his mother, (J.A. 004831), and she was subsequently transferred to hospice care where all medical interventions were withdrawn, except for morphine. (J.A. 008479).

Plaintiffs also misstate other crucial aspects of the record. They say, for instance, that "control" of a family of companies known as HCR Manor Care "rested with one entity, Manor

Care, Inc." Pl. Br. 1. But Manor Care, Inc., is a stock holding company with no employees. The *only* evidence presented at trial against Manor Care, Inc., were the minutes of two board meetings that approved its corporate budget for 2010 and 2011. *See* (J.A. 006746-51). *No evidence* was presented that the Manor Care, Inc., board approved the corporate budget for 2009 when Dorothy Douglas was resident. Nor was there any evidence that the board ever sought reductions to the facility budget as presented. *See* (J.A. 005119). The uncontroverted testimony established that no corporate official of a parent company or any other Defendant ever rejected a Heartland budget or otherwise sought to cut or limit staffing at the facility. *See* (J.A. 005081-82, 005119). The absence of any evidence that could establish the direct liability of Manor Care, Inc., is critical here because, as Plaintiffs admit, they "did not proceed against any of Defendants on the basis of vicarious liability," Pl. Br. 12, and yet Plaintiffs' punitive damages case focused heavily on the wealth of this Defendant. *See* (J.A. 005692-93, 005714-15, 005721).

The liberties Plaintiffs take with the facts are dramatic. But as demonstrated below, they are exceeded by the liberties they take with the applicable law.

ARGUMENT

I. The Plain and Prejudicial Flaws In The Verdict Form Require A New Trial.

A. The verdict form failed to require separate determinations of liability.

Plaintiffs do not deny Defendants had the right to separate determinations of liability for each Defendant. They also do not deny that the verdict form instead asked the jury to make a single determination of liability for Defendants as a group, creating the real possibility that some were improperly held liable for the conduct of others.

Plaintiffs respond to this facial violation of Defendants' MPLA and constitutional rights by crying waiver. *See* Pl. Br. 5-7. By doing so, they seek to distract this Court from the

flagrantly-flawed verdict form that hopelessly confused the jury and denied the Defendants the separate determinations of liability they are guaranteed by West Virginia law and constitutional due process. Plaintiffs insist that the trial court "specifically found" that the Defendants did not "object to the verdict form selected by the Court on the basis that it did not allow for a separate determination of liability and allocation of fault as it related to compensatory damages." Pl. Br. 6, *citing* (J.A. 000019). Whether the trial court specifically made any findings is questionable, as it adopted Plaintiffs' draft Order and opinion denying the post-trial motions in full.[1] In any event, Defendants did object to the verdict form's grouping of all the Defendants for the purpose of determining liability. The trial court's contrary conclusion ignores Defendants' proposed jury verdict form, *even after* this Court ruled by extraordinary writ that the Defendants' proposed jury form is part of the record. *See State ex rel. Manor Care, Inc. v. Zakaib,* 2012 WL 3155746 (W.Va. 2012), (J.A. 003764-66). The first four pages of this proposed jury verdict form would have required the jury to make separate findings on liability and causation for each of the four Defendants. (J.A. 001418-21). Plaintiffs' position that Defendants needed to do more to preserve their objection—to continue to argue with the trial judge about the wisdom of his decision after the court ruled that it had selected Plaintiffs' proposed verdict form over Defendants' objection—is absurd. (J.A. 005642). If adopted, it would inexorably lead to endless, unproductive, and likely uncivil exchanges at trial.

B. The verdict form enabled the jury to award duplicative damages.

Plaintiffs concede that "[t]he verdict form contained multiple questions related to survival damages: the NHA claim (questions 1 and 2) and fiduciary duty claims (question 6 and 7)." Pl.

[1] Trial courts do sometimes adopt one party's submission without alteration. This practice is not objectionable where the issues are simple and the stakes are low. But this is not a simple, low-stakes case, Petitioners raised 36 separate objections in their Motion for Judgment as a Matter of Law, or in the Alternative for New Trial, or in the Further Alternative for Remittitur. In these circumstances, the trial court's *verbatim* adoption of Plaintiffs' entire 18 page proposed order and opinion *verbatim* diminishes the independent weight of its "findings" and its reasoning.

Br. 10. Noting that the jury awarded $5 million in survival damages on Question 7 and $1.5 million on question 2, Plaintiffs postulate that one might "assume the jury would have entered a survival damage award of $6.5 million if provided a single opportunity on the verdict form." *Id.* Then, in a footnote, Plaintiffs suggest that, if the survival damages are duplicative, "the larger should effectively 'swallow' the smaller and a general award of survival damages should stand at $5 million, aggregate, for both theories of liability." *Id* at n. 8. The problem is that no matter what Plaintiffs might assume or postulate, because of the flawed verdict form that Plaintiffs proffered and the trial court adopted, no one really knows what the jury might have done.

Plaintiffs cry waiver to this objection as well, insisting that Defendants did not preserve this issue for appeal. But Defendants specifically objected that the damages for breach of fiduciary duty would be duplicative. (J.A. 005625).[2] Plaintiffs then stretch further: "Defendants now complain about the error they created." To the contrary, Defendants' summary judgment motions asked the trial court to follow the precedent of other trial courts in West Virginia and properly limit this action to one claim under the MPLA. *See* (J.A. 000455). This would have eliminated all threat of duplicative claims and damages. And at trial, Defendants never relinquished their position that the NHA and fiduciary breach claims should have been excluded or subsumed by the MPLA. (J.A. 000864).

Plaintiffs protest that the trial court's decisions respecting the verdict form are reviewable only for abuse of discretion. Pl. Br. 8, citing *Perrine v. E.I. DuPont de Nemours,* 225 W.Va. 482, 694 S.E.2d 815, Syl. Pt. 4 (2010). However, *Perrine* held only that "***generally***, this Court will apply an abuse of discretion standard when reviewing a trial court's decision regarding a verdict form." *Id.* at 539. *Perrine* noted exceptions that required a more rigorous standard of review:

[2] Regardless, the trial court's mistake was plain error that may be corrected on appeal.

> In West Virginia, there appear to be three [exceptions] to the general rule that special verdicts and/or special interrogatories are within the complete discretion of the trial court. The first is where special interrogatories are compelled by statute.... The second is in cases involving multiple causes of action where at least one of the causes of action is not supported by sufficient evidence to make it a legitimate jury issue. The third [exception] involves punitive damages.

Perrine, 225 W.Va. at 539 & n.61. All three of these exceptions apply herein the present case. *See generally,* D. Br. 10-11 (special interrogatories on percentages of fault attributable to each separate Defendant *required* by W.Va. Code § 55-7B-9(a)(5)); at 25-26 (insufficient evidence to support a breach of fiduciary duty, one of three causes of action in this case); and at 29-30 (absence of requirement in jury form that jury determine whether the conduct of each defendant individually warranted punitive damages was reversible error).

C. The verdict form provision inviting the jury to award damages to non-parties was an egregious and plain error that requires a new trial.

Plaintiffs represented to the trial court that the jury verdict form was "just going to track the [jury] instructions," which the court had specifically instructed should award damages to the Estate of Dorothy Douglas, not directly to Tom Douglas individually and his non-party sister, Carolyn Hoy. (J.A. 005621). Plaintiffs failed to follow through. They now claim that "neither party realized that the verdict form had not been changed to add the language: 'to the Estate.'" Pl. Br. 10. That rings untrue. Defendants' counsel relied on Plaintiffs' representation that the verdict form would track the revised jury instructions with respect to verdict form Question No. 5, which included the improper award directly to the non-party children: "Number five, I think they're going to change because of the reasons we discussed earlier." (J.A. 005625). Plaintiffs raise no legitimate excuse for failing to revise Verdict Form Question No. 5 as they promised the trial court and counsel, and their new assertion that it was somehow a joint error ("neither party realized") is disingenuous.

Plaintiffs also misread West Virginia's Wrongful Death Act to allow the direct award of damages to non-party children instead of to the estate. *See* Pl. Br. 11. Plaintiffs argue that "any recovery passes to the beneficiaries designated in the wrongful death statute and not to the estate[,]" quoting *Ellis v. Swisher ex rel. Swisher*, 230 W.Va. 646, 741 S.E.2d 871, 875 (2013) (per curiam). Of course a wrongful death recovery eventually passes to the beneficiaries. But the Wrongful Death Act clearly provides that this distribution is *secondary* to the primary awarding of the damages to the estate:

> Every such [wrongful death] action shall be brought by and in the name of the personal representative of such deceased person who has been duly appointed in this state, ... and *the amount recovered in every such action shall be recovered by said personal representative* and *be distributed* in accordance herewith.

W.Va. Code § 55-7-6(a) (emphasis added). Neither *Swisher* nor any other precedent of this Court alters the statutory primacy of the estate under the Wrongful Death Act.

II. The MPLA Is The Exclusive Remedy For Plaintiffs' Claims.

Plaintiffs insist they successfully pled around the MPLA's damages cap by expanding the types of *claims* they alleged and the *parties* against whom they filed suit. This Court should reject these evasive maneuvers. As explained in our opening brief, all of Plaintiffs' claims against all of the Defendants are governed by the MPLA because ultimately they all are grounded in "medical professional liability," a term the statute defines broadly to include "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." § 55-7B-2(i) (emphasis added). Accepting Plaintiffs' work-arounds would create gaping loopholes in the MPLA and defeat the Legislature's purpose in creating the statutory damages caps. This Court should hold that the MPLA applies to all of Plaintiffs' claims.

A. The claims against all Defendants fall within the MPLA

Defendants explained that the MPLA applies to Plaintiffs' claims against all of the Defendants because the claims against each Defendant are, ultimately, "based on" healthcare services rendered or which should have been rendered by "health care providers"—the Heartland nursing home and its staff. *See* W. Va. Code § 55-7B-2(i).

Plaintiffs assert that Defendants somehow waived the argument because Manor Care, Inc., HCR Manor Care Services, Inc., and Heartland Employment Services, LLC admitted they were not themselves "health care provider[s]." Pl. Br. 12. That argument is meritless. What matters is that Plaintiffs' claims against these corporate defendants are based on Plaintiffs' allegation that Ms. Douglas was injured as a result of the healthcare services that she received—or allegedly did not receive—from the nursing home and its staff. Plaintiffs' contention that budgetary and other decisions up the corporate chain are the reason why those healthcare providers allegedly furnished inadequate health care services does not change the fact that the claims turn on the adequacy of the healthcare services provided. Allowing Plaintiffs to evade the MPLA's damages caps by including corporate parents as defendants would re-establish the excessive noneconomic damages regime that endangered this State's healthcare system.

Plaintiffs' attempt to leverage claims against Heartland's corporate parents also fails for another fundamental reason. Since these corporate defendants did not provide or cause any of the allegedly deficient healthcare at issue, they should not have been found liable period—under the MPLA or outside of it. It is settled law that one corporation cannot be held liable vicariously for the actions of agents of a *different* corporation. *Southern Elec. Supply v. Raleigh. Cty. Nat. Bank*, 173 W. Va. 780, 788, 320 S.E.2d 515, 523 (1984). Plaintiffs say that they are not seeking vicarious liability. *See* Pl. Br. 12. They insist that Heartland's corporate parents are directly liable because they effectively controlled the nursing home. But, however they try to spin it, a

contention that a parent company should be held liable for having controlled the actions of its subsidiary is an argument for veil-piercing, a species of vicarious liability. In addition to having repeatedly disclaimed reliance on a veil-piercing theory, *id*; *see also* (J.A. 001298; J.A. 004515), Plaintiffs did not remotely satisfy the high standard for piercing the corporate veil. *See Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 347-48, 352 S.E.2d 93, 98 (1986) (19 factors include "commingling of funds," "failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking," and the "absence of separately held corporate assets"); *West Virginia Highlands Conservancy, Inc. v. Public Service Commission of West Virginia*, 206 W. Va. 633, 640, 527 S.E.2d 495, 502 (1998) (veil piercing not warranted based on "the use of dual officers and directors, its use of a trade name ('Allegheny') for operational purposes, and its employment of streamlined management").

B. All of Plaintiffs' claims fall within the MPLA.

The MPLA applies "regardless of how the claims have been pled" when "the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care.'" *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007). That holding is controlling here because, despite their differing labels, all of Plaintiffs' claims are "based on" "health care services" that were rendered or should have been rendered. The crux of all of Plaintiffs' claims is that Heartland nursing home's failure adequately to care for Ms. Douglas resulted in her injuries, dehydration, and death. The alleged acts (or failures to act) all fit squarely within the MPLA's definition of "health care": "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or

confinement." §55-7B-2(e).[3] Plaintiffs cannot evade the MPLA's liability caps merely by removing the healthcare label from some of their healthcare claims.

1. Plaintiffs' supposed "ordinary negligence" claims are "based on" healthcare services.

Plaintiffs argue that their complaint about budgetary and staffing decisions by entities up the corporate chain is an "ordinary negligence" claim not governed by the MPLA. Pl. Br. 18-19. That argument is meritless for two reasons. *First*, this claim fails factually because Plaintiffs presented no evidence that any of Heartland's affiliated corporations took any action with respect to the nursing home's budget for the period in which Ms. Douglas was there or that any budgeting decisions made at the corporate level caused inadequate staffing in the nursing home. *See* Trial Ex. 9 ("annual" budget for 2010 and 2011). *Second*, simply denominating the claim as one of "ordinary negligence" does not change its character or otherwise free it from the constraints of the MPLA. Regardless of nomenclature, Plaintiffs' claim is that the supposed corporate budgeting and staffing decisions *caused* inadequate healthcare. Justice Davis's concurrence in *Riggs v. West Virginia University Hospitals, Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007), provides Plaintiffs no support here. *Riggs* involved an alleged bacterial contamination of common areas in a hospital—a condition that affected the hospital's patients and visitors alike—not negligence in the direct provision of health care. *Id.* at 666 (noting that the hospital "breached a *general* duty it owed to all patients *and nonpatients* to maintain a safe environment" (emphasis added)). Plaintiffs' reliance on Justice Davis's concurrence is misplaced.

[3] That definition of course does not encompass actions by a healthcare provider that are "unrelated to providing medical care," *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 707, 656 S.E.2d 451 (2007), or could not "possibly be construed as having occurred within the context of the rendering of health care services." *R.K. v. St. Mary's Medical Center, Inc.*, 735 S.E.2d 715, 719 (2012). But even Respondents do not contend that high standard is satisfied here.

2. Plaintiffs' NHA claims are not exempt from the MPLA.

NHA claims respecting a healthcare provider's provision of (or failure to provide) healthcare services are not exempt from the MPLA. To the contrary, the legislature has *twice* confirmed that the MPLA does apply to claims brought under the NHA. *First*, in 2003, the legislature amended the MPLA by, *inter alia*, further reducing the cap on noneconomic damages specifically because "medical liability issues h[ad] reached *critical* proportions for the state's long-term health care facilities," including the state's nursing homes. W. Va. Code §55-7B-1. (Emphasis added). The legislature concluded that "[m]edical liability insurance premiums for nursing homes in West Virginia continu[ed] to increase and the number of claims per bed ha[d] increased significantly" and "medical liability premium costs for some nursing homes constitut[ed] a significant percentage of the amount of coverage," which had led "some facilities to consider dropping medical liability insurance coverage altogether." *Id.* *Second*, Senate Bill Number 101, effective July 1, 2013, expressly provided that "[n]othing in [the NHA] *or any other section of the code* shall limit the protections afforded nursing homes or their health care providers under [the MPLA]. *Nursing homes and their health care providers shall be treated in the same manner as any other health care facility or health care provider* under [the MPLA]." S.B. 101 at 6-7; W. Va. Code. 16-5C-15(g) (emphasis added). The legislature explained that the amendment did not modify the original terms of the MPLA but merely "clarify[ied] [what] the Legislature *originally* intended.". S.B. 101, Note, at 7 (emphasis added).

Plaintiffs contend that the NHA "includes certain claims that fall outside of the MPLA," Pl. Br. 16, and they cite a case from Illinois analyzing Illinois' Healing Arts Malpractice Act for the proposition that some claims under the Illinois Nursing Home Care Act "have nothing whatever to do with medical or healing art malpractice." Pl. Br. 17, *quoting Eads v. Heritage*

Enter., Inc., 787 N.E.2d 771, 778-79 (Ill. 2003). That is irrelevant because the NHA claims at issue here *are* based on allegedly inadequate medical care.

III. Tom Douglas' Claims In His Individual Capacity Must Be Dismissed.

Plaintiffs do not dispute that Tom Douglas was an improper party in his individual capacity. *See* Pl. Br. 23-25. Instead, they declare that was a harmless error, citing the trial court's finding that, although "Tom Douglas, as the Administrator of the Estate of Dorothy Douglas, was the appropriate party in this matter, *nothing material would have changed"* by excluding Tom Douglas from this action in his individual capacity. *Id.* at 24; *see also* (J.A. 000024). But the jury verdict form confirms the absurdity of the trial court's conclusion that this error of allowing Tom Douglas as an individual plaintiff was *not* harmless. The jury awarded $5 Million in "compensatory damages" to Tom Douglas (and his sister) individually, *see* Jury Verdict Form Question 5, and also $5 Million in "compensatory damages" to "the Estate of Dorothy Douglas," *see* Jury Verdict Form Question 7. This jury confusion and duplication cannot be harmless.

Plaintiffs also argue that dismissal of Tom Douglas's *individual* claim would have been improper based on *Richardson v. Kennedy,* 197 W.Va. 326, 475 S.E.2d 418 (1996). But *Richardson* does not support that position. In *Richardson*, this Court held that, even though the individual plaintiff was the "sole beneficiary of the estate," she had no standing to bring a wrongful death action under the statute, W.Va. Code § 55-7-6(a). 197 W.Va. at 332. Applying Rule 17(a), *Richardson* required that the individual plaintiff be given a reasonable time to attempt to qualify as the estate's personal representative so that she could then amend and sue in that representative capacity. *Id.* at 333-34. But, as discussed, in this case the proper party—the Estate—had already been named, so the improper party simply should have been dismissed.

Plaintiffs also argue that the trial court properly found that Defendants waived any challenge respecting Tom Douglas as an improper plaintiff in his individual capacity. Pl. Br. 23; *see also* (J.A. 000024). But as there is no West Virginia wrongful death claim for a decedent's survivor in his individual capacity, the courts have no subject matter jurisdiction over claims brought by individual survivors. Lack of subject matter jurisdiction can never be waived and may be raised at any time. WVRCP 12(h)(3). After conceding that this Court has not addressed whether Rule 12(h)(3) would apply in these circumstances, Respondents cite "Wright & Miller" and federal case law from other jurisdictions for the proposition that "real party in interest" issues are not jurisdictional. Pl. Br. 23-24. These cases, however, are neither controlling nor on point. Typical real-party-in-interest cases involve a cause of action designed for individual or entity plaintiffs but brought by the *wrong* individual or entity. In contrast, the present case involves a lawsuit brought by the correct entity (the Estate) *and* by an improper individual asserting the same wrongful death claims in duplicate. A court acting on a typical real-party-in-interest objection faces the decision of dismissing the entire suit; in the present matter, the Court does not consider dismissal of the entire action but only dismissal of the improper (and duplicative) individual plaintiff.

IV. The Trial Court Erred In Allowing A Fiduciary Duty Claim Based On The Delivery Of Healthcare Services.

Defendants explained in their opening brief that West Virginia law does not recognize a fiduciary duty claim based on inadequate medical care. Only Defendant Health Care and Retirement Corporation of America, LLC ("HCRCA") had any relationship with Ms. Douglas, and that relationship was purely contractual. There is no evidence that HCRCA—or any of the other Defendants—agreed to subordinate their interests to Ms. Douglas's interests or agreed to anything beyond the contractual relationship the parties entered into. HCRCA's contractual

agreement to provide healthcare services to Ms. Douglas did not give rise to fiduciary obligations with respect to those healthcare services. *See Elmore v. State Farm Mut. Automobile Ins. Co.*, 202 W. Va. 430, 436, 504 S.E.2d 893, 899 (1998).

Plaintiffs cite no West Virginia law that supports their extraordinary fiduciary duty claim. Instead, they ask this Court to make *groundbreaking new law* recognizing a fiduciary duty to provide adequate healthcare—based on two Louisiana cases (one of which is based on the other and both of which occurred before Louisiana's legislature amended its Medical Malpractice Act to define nursing homes as "health care providers," LSA-R. S. § 40:1299.41(A)(10).[4] But those out-of-state cases are inconsistent with West Virginia law. In the context of healthcare services, West Virginia courts have confined fiduciary breach claims to a healthcare provider's duty to maintain confidentiality. *See* D. Br. 26-27. Plaintiffs' theory would greatly expand the core concept of fiduciary duty. Under Plaintiffs' theory, every patient puts a "special trust" in his doctor, so every medical malpractice claim would also give rise to a fiduciary duty claim. There is no reason for this Court to accept Plaintiffs' invitation to create an entirely new "medical fiduciary duty" cause of action that is completely duplicative of the existing medical malpractice cause of action.[5] The only practical effect would be to allow these Plaintiffs and future plaintiffs

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[4] Plaintiffs also cite *Zaborowski v. Hospitality Care Ctr. of Hermitage, Inc.*, but there the court struck the fiduciary duty count on the ground that the plaintiff "fails to aver that plaintiff decedent reposed a special confidence in either Cassity or Bible to the extent that the parties did not deal with each other on equal terms, either because of the overmastering dominance of Bible or Cassity or weakness, dependence or justifiable trust on the part of plaintiff decedent." 60 Pa. D. & C.4th 474 , 482 (Ct. Common Pleas 2002).

[5] Most other states agree that medical fiduciary duty claim is duplicative of medical malpractice claim. *See, e.g., Neade v. Portes, 193 Ill.2d 433, 441, 739 N.E.2d 496, 501 (Ill. 2000);* (declining to "recognize a new cause of action for breach of fiduciary duty when traditional medical negligence claim sufficiently addressed the same alleged misconduct."); *D.A.B. v. Brown, 570 N.W.2d 168, 171 (Minn. App. 1997)* (declining "to create a new cause of action" because to hold otherwise would make "it is difficult to imagine any medical malpractice claim that would not be pleaded as a breach of fiduciary duty claim in order to bypass legislative procedures[.]"; *Spoor v. Serota, 852 P.2d 1292, 1294-1295 (Colo. App. 1992)* (finding that the trial court properly denied the plaintiffs' request to add a claim for breach of fiduciary duty to their complaint against their physician where the breach-of-fiduciary-duty claim would have been duplicative of their negligence claims); *Awai v. Kotin, 872 P.2d 1332 (Colo.App.1993)* (finding that claim for breach of fiduciary duty against psychologist properly dismissed where factual allegations supporting claim were same factual allegations that supported claim of negligence and, thus, were duplicative);

to end-run the MPLA. *See* Section II, *supra*. This Court should refuse Plaintiffs' invitation to recognize a cause of action that is at odds both with the fundamental principles that govern the creation of fiduciary relationships and with the legislature's intent to curb excessive verdicts against healthcare providers.

Not only is there no West Virginia cause of action for fiduciary breach based on inadequate healthcare services, but the evidence here would not support such a claim. Plaintiffs and the trial court relied solely on evidence that Heartland nursing home did not inform Ms. Douglas that it was short-staffed and had a history of complaints of short-staffing. (J.A. 000023). Even under the trial court's erroneous jury charge, that would not establish a fiduciary duty. The jury was charged as follows:

> That the Defendant violated that fiduciary obligation by failing to provide the appropriate level of care and services to which Dorothy Douglas was entitled, by accepting payment for services to which Dorothy Douglas was entitled, by accepting payment for by their concealment of and failure to disclose Defendants' neglect of Dorothy Douglas[.]

(J.A. 005680). This jury charge did not include informing Ms. Douglas erroneously about the general adequacy of its staffing.

But even if this Court were to take the extraordinary step of holding that a nursing home owes a fiduciary duty with respect to the provision of healthcare services, and even if Heartland could be held liable for breach, that would still not save the jury verdict. By no stretch of even Plaintiffs' legal imagination could the other entities up the corporate chain—who were not providing care to Ms. Douglas—have owed her a fiduciary duty. Plaintiffs themselves suggest

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Hales v. Pittman, 118 Ariz. 305, 576 P.2d 493 (1978) (declining to find a breach of trust action arising from an undisclosed risk of surgery where the plaintiff had an adequate remedy through a medical malpractice action should any undisclosed risk occur); *Garcia v. Coffman, 124 N.M. 12, 19, 946 P.2d 216, 223 (1997)* (finding that breach of fiduciary duty claim is duplicative of a negligence claim); and *Stafford-Fox v. Jenkins, 282 Ga. App. 667, 639 S.E.2d 610 (Ga. App. 2006)*; (upholding summary judgment on plaintiff's ordinary negligence and breach of fiduciary duty claims where both claims against the doctor "arose out of acts or omissions involving doctor's medical skill and judgment in regards to his misdiagnosis of vitamin B-12 deficiency, and thus, all of patient's claims sounded in medical malpractice.").

no way in which the verdict holding all Defendants jointly liable for breach of fiduciary duty could possibly be defended.

Faced with these fundamental and inescapable deficiencies in their legal theory and evidence, Plaintiffs claim that the Defendants waived any objection to their fiduciary duty claim. That is untrue. Defendants clearly objected to the submission of this claim to the jury. *See* (J.A. 005548-51). Defendants' counsel posited that fiduciary duties arose in "only economic relationships[,]" not healthcare relationships. (J.A. 005550). Plaintiffs' contention that this argument was waived by Defendants should be rejected.[6]

V. The $80 Million Punitive Damages Award Should Be Vacated Or, At A Minimum, Substantially Reduced.

The jury's $80 million punitive damages award is premised on Manor Care, Inc.'s wealth, but there is no evidence that Manor Care, Inc., engaged in conduct warranting punitive damages. Plaintiffs respond only with a legal precedent this Court has disavowed and again cry waiver. Their arguments have no merit.

A. Plaintiffs rely on a standard that this court has expressly disavowed and does not apply here in any event.

Plaintiffs argue that "really mean" conduct justifies greater punitive damages limits under *TXO Production Corp. v. Alliance Resources Corp.*, 186 W. Va. 656, 413 S.E. 2d 897 (1992). This Court rejected that principle 13 years ago in *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122, 131 (1996) ("We believe that it is appropriate at this time to remove from the lexicon of reviewing the amount of a punitive damage award the terms 'really mean' and 'really stupid,' as they were applied in TXO."); *see also id.* at Syl. Pt. 6.

[6] The Court, moreover, may always consider sufficiency of the evidence to establish any claim "where the insufficiency of the evidence constitutes plain error apparent on the face of the record which if not noticed would result in a manifest miscarriage of justice." *Montgomery v. Callison*, 226 W.Va. 296, 302, 700 S.E.2d 507, 513 (2010) (quoting *Chambers v. Smith*, 157 W.Va. 77, 198 S.E.2d 806 (1973)).

Nor would Defendants' conduct qualify as "really mean" in any event. The trial court did not find that any Defendant intended to cause Ms. Douglas harm, (J. A. 000043-45), and Plaintiffs argued only that Defendants' conduct was "reckless," not intentionally harmful. (J.A. 005713, 005721). Even Plaintiffs' own summary of the evidence confirms that Defendants did not act with an intent to cause harm. Plaintiffs argue that certain employees knew the facility was understaffed because it received a warning from the State and employees complained and voiced concerns that the facility "was not paying enough to improve recruitment." Pl. Br. 29-31. That does not evidence an intention to harm nursing home residents. Nor would a Defendant's supposed failure to increase the Heartland budget. *Id.* at 31. And, once again, Plaintiffs adduced no evidence that Manor Care, Inc., approved any budget relating to the nursing home covering the period when Ms. Douglas was at Heartland. On neither the law nor the facts can Plaintiffs justify higher punitive damages limits because Defendants' conduct was "really mean."

B. The punitive damages award must be vacated because the verdict form failed to require individualized determinations of punitive liability.

Defendants explained in their opening brief that the punitive damages award must be vacated because the verdict form failed to require individualized determinations of punitive liability and thus violated state and federal law. Plaintiffs do not contest that the verdict form was fundamentally flawed. *See* Pl. Br. 5-7, 32-33. They only argue waiver, and that argument is meritless. As explained, *see supra* of subsection A of Section I, Defendants' proposed verdict form would have required the jury to separately find whether each Defendant's own conduct justified punitive damages. Defendants withdrew that request only after the trial court rejected Defendants' proposal and Defendants confirmed that the "objection is on the record." (J.A. 000027, 005612.)

C. The punitive damages award must be vacated because the trial court improperly allowed the jury to consider evidence of Manor Care, Inc.'s wealth.

Defendants explained in their opening brief that the punitive damages award must be vacated because the trial court improperly allowed Plaintiffs to make Manor Care, Inc.'s wealth the centerpiece of their argument, when there was no evidence that Manor Care, Inc.'s conduct warranted any punitive damages. The only evidence of Manor Care, Inc.'s own conduct was its board's approval of corporate budgets for two years in which Ms. Douglas did ***not*** reside at Heartland. Plaintiffs now insist that Manor Care, Inc.'s wealth was "in no way made a feature of the case." Pl. Br. 33. But that is simply untrue. Literally every time Plaintiffs' counsel mentioned punitive damages during closing argument, he mentioned Manor Care, Inc.'s wealth. *See* (J. A. 005694, 00574-15, 005721). For example, counsel argued that "Manor Care, Incorporated, for one year, in 2009, earned $4 billion dollars, one year" and it had "$7.9 billion dollars in assets." (J.A. 005714). And counsel ended his discussion of punitive damages by again emphasizing Manor Care, Inc.'s wealth and telling the jury "we have no doubt you'll make the right decision." (J.A. 005721).

Plaintiffs also argue that any focus on Manor Care, Inc.'s wealth was justified because Defendants did not provide distinct financial information for Heartland nursing home prior to trial. But it is far too late for Plaintiffs to complain about discovery conduct, especially since the requested information was publicly reported to and available from the West Virginia Healthcare Authority. (J.A. 006682-84). There is no justification for allowing the jury to inflate the punitive damages assessed against all Defendants based on the wealth of one Defendant whose conduct did not warrant any punitive damages at all.

Finally, Plaintiffs (again) argue waiver. That argument (again) fails. Defendants specifically objected to the admission of Manor Care, Inc.'s tax return on the ground that there

was not sufficient evidence of Manor Care, Inc.'s liability. *See* (J.A. 005155-56.)

VI. At A Minimum, This Court Should Remit The Punitive Damage Award As Unconstitutionally Excessive.

A. The trial court improperly justified the punitive damages award based on Defendants' punitive damages insurance.

Plaintiffs argue that the trial court was permitted to consider evidence of Defendants' punitive damages insurance to rebut Defendants' argument in the *Garnes* hearing about the financial consequences of such a large punitive damages award. *See* Pl. Br. 35-36. But that narrow rebuttal rationale provides no support for the trial court's conclusion that, as a matter of "public policy," the existence of punitive damages insurance weighs heavily in the *Garnes* analysis and justifies enhanced punitive damages. This Court has repeatedly held that West Virginia public policy does not preclude punitive damages insurance. Yet, if courts are permitted to uphold otherwise disproportionate punitive damages awards based on the existence of such insurance, it will effectively eliminate the coverage.[7]

B. The amount of the punitive damages award is grossly disproportionate to the amount of compensatory damages.

The $80 million punitive damages award must be remitted because it is grossly disproportionate to the $500,000 of compensatory damages[8] allowable under the MPLA: a ratio of 160 to one. That ratio vastly exceeds the one-to-one limit mandated by federal law where, as here, the compensatory damages are substantial. Plaintiffs do not dispute that that.

Instead, Plaintiffs protest that the ratio is only 7 to 1 because the denominator should be the uncapped $11.5 million of compensatory damages awarded by the jury. In Plaintiffs' view,

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[7] In *Wheeler v. Murphy*, 192 W. Va. 325, 331-33, 452 S.E.2d 416, 422-24 (1994), this Court held that a plaintiff was permitted to introduce evidence of the defendant's liability insurance as rebuttal evidence after the defendant had argued to the jury that it should not award punitive damages because he had almost no income. But the Court never suggested that the existence of punitive damages insurance could justify otherwise excessive punitive damages.

[8] Applying the MPLA's statutory inflationary adjustment, the amount is $594,615.22.

even if this Court reduces the compensatory damages to $500,000 (or some other amount) based on the MPLA cap, the Court should still use the higher $11.5 million figure to gauge the constitutionality of the punitive damages award. Plaintiffs are wrong. The legislature has determined that the MPLA's "maximum amount recoverable"—$500,000 plus inflation—will "fairly compensate patients." W. Va. Code §55-7B-8(a). And defendants are on notice that the maximum economic compensatory damages for which they may be held liable is $500,000+. Both the proportionality concerns and the notice aspects of due process limits therefore demand use of that $500,000+ capped amount in any constitutional ratio analysis. Use of the capped compensatory award for due process ratio purposes is consistent with the practice of other courts.[9]

For these reasons, punitive damages cannot exceed the statutorily capped amount for compensatory damages.[10]

C. $80 million in punitive damages is grossly disproportionate to civil penalties for comparable conduct.

Defendants explained in their opening brief that the $80 million in punitive damages awarded here is grossly disproportionate to civil penalties for comparable conduct. Both West

[9] Respondents argue that the cases Defendants cite are inapplicable because the caps at issue applied to both compensatory and punitive damages. Pl. Br. 36 n.23. But the key is that in assessing whether the reduced punitive damages awards were unconstitutionally excessive, the courts compared the punitive award to the *capped* compensatory damages award. *See Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 785 (8th Cir. 1999); *Forsberg v. Pefanis*, 2009 WL 4798124, *12 (N.D. Ga. July 1, 2011). Similarly, in *Williams v. ConAgra Poultry Co.*, the court held that the "punitive damages award upheld by the district court was more than ten times the compensatory award for Mr. Williams's harassment claim *after remittitur*." 378 F.3d 790 (9th Cir. 2004).

[10] Plaintiffs are also wrong in contending that a 7:1 ratio would be permissible here. As discussed, the United States Supreme Court has held a one-to-one limit applicable where, as here, the judgment involves a "substantial" compensatory award and there was no actual intention to cause harm. *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2002); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 n.28 (2008). *See, e.g.*, D. Br. 37 (citing examples of holdings limiting awards do a 1:1 ratio); *cf. Perrine v. E. I. du Pont de Nemours & Co.*, 225 W. Va. 482, 557 (2010). (approvingly citing case in which compensatory damages were $9.025 million and punitive damages were remitted from $25 million to 12.5 million).

Virginia and federal law imposes fines for inadequate staffing at nursing homes, and the fines would at most be $190,000 for a two-week period. D. Br. 38-39. Plaintiffs do not dispute this.[11]

Instead, Plaintiffs make the reprehensible argument that Defendants' conduct is similar to *murder* which is punishable by years in prison. Nonsense. Understaffing at a nursing home is not comparable to murder. There is a reason that West Virginia and the United States assess only *civil* penalties for inadequate staffing at nursing homes. The $80 million in punitive damages awarded here is grossly disproportionate to the maximum of $190,000 of civil penalties assessable for the same conduct.

CONCLUSION

The trial court's rulings below are irreparably flawed – inconsistent with the facts, the law, and basic constitutional principles. The verdict should be set aside, reversed, and the case remanded for a new trial or, at a minimum, the compensatory damages should be reduced to the statutory cap prescribed by the MPLA and the punitive damages reversed and remanded.

Respectfully submitted,

Manor Care, Inc.; HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC; Heartland Employment Services, LLC

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[11] Respondents argue that Petitioners waived the argument by failing to raise it before the trial court, but Petitioners raised the argument in their post-trial briefs, (J.A. 008600-01), which was the first chance they had to contest the excessive nature of the punitive damages award.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of October, 2013, the foregoing **Petitioners' Reply Brief** was deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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