

15-0553

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA  
NICHOLAS COUNTY, WV

**Wanda Williams, Individually and  
on behalf of the Estate and  
Wrongful Death Beneficiaries  
of Robert Thompson,**

2015 JAN 28 A 10:07

**Plaintiff;**

**v.**

**CIVIL ACTION NO.: 13-C-92  
Honorable Gary L. Johnson**

**CMO Management, LLC;**

**Defendants.**

**JUDGMENT ORDER**

The parties, by their respective counsel, appeared before the Court in the above-referenced civil action on Tuesday, October 21, 2014 for purposes of selecting a jury to hear this matter. Voir dire was undertaken by the Court and respective counsel for the parties, and the jury was impaneled and sworn on that date.

Thereupon, opening statements from the respective parties were presented. Plaintiff presented her case in chief through various witnesses on October 21 through October 23, 2014. At the close of plaintiff's case, defendants moved pursuant to Rule 50 of the West Virginia Rules of Civil Procedure for judgment as a matter of law as to the corporate negligence and punitive damage claims. The Court, as appearing more fully on the record, denied defendant's motion as to corporate negligence and deferred ruling on defendant's motion regarding punitive damages and requested briefing on the punitive damages issues from the parties.

Thereupon, the defendant put on its case via several witnesses on Monday, October 27, 2014. Thereupon, on Monday, October 27, the parties argued jury

instructions and the verdict form to the Court. The Court supplied a version of the jury charge and verdict form to the parties. Discussion and argument were heard by the Court and, for matters more fully appearing on the record, a Jury Charge and Verdict Form were propounded.

On Tuesday, October 28, 2014, the Court, after reviewing the briefs of the parties on this issue, granted defendant's Rule 50 motion as to punitive damages for reasons more fully appearing on the record and per an Order entered on October 29, 2014. The Court previously denied defendant's Rule 50 motion as to corporate negligence. Defendant then presented a final witness. The jury was charged with the law and heard closing arguments from counsel. Thereupon, the jury was supplied with the verdict form and retired for its deliberations at approximately 4:50 p.m.

At approximately 6:35 p.m. on October 28, 2014, the jury returned its verdict as follows:

**"VERDICT FORM**

1. a. Do you find, by a preponderance of the evidence, that Defendant was negligent by deviating from the standard of care in its care and treatment of Robert Thompson?

X  YES          NO

b. Do you find, by a preponderance of the evidence that Defendant deprived Robert Thompson of any right or benefit created or established by statute or regulation?

X  YES          NO

2. If you answered NO to Question 1.a. or 1.b., then you have finished your work, and your foreperson should sign and date the Verdict Form on page 2.

If you answered YES to either Question 1.a. or 1.b., then do you find, from a preponderance of the evidence, that the deviation from the standard of care by the Defendant or any deprivation of Mr. Thompson's rights or benefits proximately caused the pre-death and suffering by Robert Thompson and/or proximately caused Robert Thompson's death?

YES       NO

3. If you answered NO to Question 2, then you have finished your work, and your foreperson should sign and date the Verdict Form on page 2.

If you answered YES to Question 2, then what percentage of the Defendants' negligence and/or violation of the standard of care was medical negligence as compared to non-medical negligence such as inadequate staffing or inadequate training?

Medical: 75%

Inadequate Staffing and/or Training 25%

(the total of these should be 100%)

4. If you answered Question 3 above, what damages should be awarded to Plaintiff?

Damages suffered by Robert Thompson: \$10,000.00

Damages suffered by the Estate of Robert Thompson: \$90,000.00

DATE: October 28, 2014

---

FOREPERSON: [signed] Betty Myers"

---

The Court asked the parties if they wished to review the Verdict Form and the parties stated that they did. Upon inspection of the Verdict Form, the parties had no objection to the form of Verdict. Neither party wished to have the jury polled.

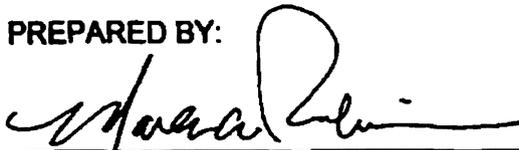
Based on the foregoing, this Court does hereby **ORDER, ADJUDGE, and DECREE** that the verdict of the jury be and hereby is **ENTERED**.

The Court notes the exceptions and objections of the parties, for reasons appearing more fully on the record, to the jury's verdict. The parties shall have the right to file the applicable post verdict motions in accordance with *West Virginia Rules of Civil Procedure*.

Entered this 28<sup>TH</sup> day of January, 2015.

  
The Honorable Gary L. Johnson

PREPARED BY:



Mark A. Robinson (WVSB #5954)  
Ryan A. Brown (WVSB #10025)  
FLAHERTY SENSABAUGH BONASSO PLLC  
200 Capitol Street  
Post Office Box 3843  
Charleston, West Virginia 25338-3843  
(304) 345-0200  
*Counsel for Defendants*

INSPECTED AND APPROVED BY:



---

Michael J. Fuller, Jr. (WVSB #10350)

A. Lance Reins (WVSB #11548)

Amy J. Quezon (WVSB # 11036)

The McHugh Fuller Law Group

97 Elias Whiddon Road

Hattiesburg, MS 39402

(601) 261-2220

*Counsel for Plaintiff*

**IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA**

WANDA WILLIAMS, individually and  
on behalf of Estate and  
Wrongful Death Beneficiaries  
of ROBERT THOMPSON,

Plaintiff,

v.

CIVIL ACTION NO. 13-C-92

CMO MANAGEMENT, LLC  
(as to Nicholas County Nursing & Rehabilitation),

Defendant.

**ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL**

On April 17, 2015, the Plaintiff appeared by counsel, A. Lance Reins and Amy J. Quezon, McHugh Fuller Law Group, PLLC, and the Defendant appeared by counsel, Mark A. Robinson and Ryan Brown, Flaherty Sensabaugh and Bonasso PLLC, for the purposes of a hearing on Plaintiff's Motion for New Trial [Doc. No. 329] and Defendant's Response in Opposition [Doc. No. 335]. The Court has carefully considered the Motion, the Defendant's Response, arguments made at the hearing, as well as other pertinent documents and legal authorities. As a result of these deliberations, the Court concludes that the Plaintiff is not entitled to a new trial, and the Motion for New Trial is hereby **DENIED** for the reasons set forth herein.

Plaintiff moves the Court for a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. In support of her Motion, Plaintiff cites four (4) alleged errors that Plaintiff contends warrant a new trial in this matter. After reviewing each allegation, the arguments of the parties and the applicable law, the Court does not find that the interest of justice requires that the Court grant the Plaintiff a new trial.

**1. Application of WVMPLA Statute of Limitations**

Plaintiff's first and primary argument is that this Court erred in applying the statute of limitations set forth in the West Virginia Medical Professional Liability Act, West Virginia Code Sections 55-7B-1, *et seq.*, (the "MPLA") to all of Plaintiff's claims in this matter. Specifically, the Plaintiff contends that this court erred in determining that general tolling provisions based on incompetency (W. Va. Code § 55-2-15) did not apply and instead, strictly construing and applying the MPLA statute of limitations (W. Va. Code § 55-7B-4) to Plaintiff's claims. This Court's decision on this issue is set forth on pages 8-10 of its Order on Motions Heard at Pre-Trial Hearing, entered on October 10, 2014 [Doc. No. 273], which is incorporated herein by reference. Specifically, at the pre-trial hearing this Court granted Defendant's Motion for Summary Judgment for Failure to Meet the Applicable Statute of Limitations Regarding Claims Accrued Prior to April 19, 2011, and found that all claims arising from Defendant's care and treatment of Mr. Thompson prior to April 19, 2011, are time-barred. Plaintiff contends that this was error for the following reasons:

**a. Application of MPLA to all of Plaintiff's claims**

Plaintiff first claims that it was error for this Court to subject the entirety of Plaintiff's action to the MPLA statute of limitations. Plaintiff cites *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014) for the proposition that claims of both ordinary and medical negligence can exist in a nursing home setting and that the MPLA need not be applied exclusively. In *Douglas*, the Supreme Court of Appeals of West Virginia recognized "the MPLA governs 'medical professional liability' actions against 'health care provider[s]' and provides the exclusive remedy for such actions. *See, e.g.*, W. Va. Code § 55-7B-6(a)." *Douglas*, 763 S.E.2d at 87. Plaintiff correctly argues that not all claims brought against a health care provider will involve "health care services" subject to the MPLA. *See, Boggs v.*

*Camden-Clark Mem. Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004); *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005). At the same time, however, “[w]here the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of ‘health care’ as defined by W. Va. Code § 55-7B-2(e), the [MPLA] applies regardless of how the claims have been pled.” *Douglas*, 763 S.E.2d at 90, quoting Syl. Pt. 4, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007).

The “decision of whether the MPLA applies to certain claims presents a fact-driven query. . . . [but] is a legal question to be decided by the trial court.” *Douglas*, 763 S.E.2d at 90, citing *Blankenship*, 221 W. Va. 700, 656 S.E.2d 451. In *Douglas*, the Court carefully applied the law to the facts to conclude that not all claims asserted by the plaintiff were related to “medical professional liability.” Specifically, in that case, plaintiffs alleged corporate negligence against the several corporate entities that operated the nursing home at issue. The corporate negligence claim was based upon a failure of those companies to allocate a proper budget to the nursing home to allow it to function properly. *Douglas*, 763 S.E.2d at 90. In ruling that the MPLA was not the exclusive remedy for Mr. Douglas’ claims, the Court held that “[c]laims related to business decisions . . . by entities that do not qualify as Health Care Providers under the MPLA simply do not fall within the statutory scheme.” *Id.* at 91.

Unlike the facts in *Douglas*, the present case does not involve any corporate entities who do not qualify as health care providers. In this case, all claims were asserted against Nicholas Nursing and Rehabilitation - - a “health care provider” - - that made all of its own staffing decisions. Plaintiff alleged that Defendant, a “health care provider,” deviated from the applicable standard of care with regard to its care and treatment of Mr. Thompson. Accordingly, the MPLA was the exclusive remedy for Plaintiff’s claims, and this Court properly applied the statute of limitations under the MPLA to Plaintiff’s claims.

**b. Reliance on the *Martin* memorandum opinions**

After determining that the MPLA applied to Plaintiff's claims, this Court applied the MPLA's two-year statute of limitations to Plaintiff's claims. *See*, W. Va. Code § 55-7B-4. Plaintiff again argues that this Court erred in strictly applying the MPLA statute of limitations (W. Va. Code § 55-7B-4) rather than applying the general tolling provisions based on incompetency (W. Va. Code § 55-2-15). At the hearing on Plaintiff's Motion for New Trial, the parties presented to the Court the same case law considered and discussed by the Court in its prior opinion. Namely, Plaintiff relied upon *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W. Va. 257, 700 S.E.2d 317 (2010) for the proposition that the statute of limitations should be tolled during the period of mental disability, pursuant to West Virginia Code Section 55-2-15; and the Defendant relied upon the more recent 2013 Memorandum Decision in *Martin v. Charleston Area Medical Center, Inc.*, 2013 WL 2157698 (WVSCA Case No. 12-0710, May 17, 2013), which reconciled the two-year statute of limitations under the MPLA (W. Va. Code § 55-7B-4) with the disability savings statute in West Virginia Code Section 55-2-15.

Plaintiff contends that it was error for this Court to rely upon the memorandum decision cited by Defendant. While this Court is aware that published opinions should be the primary sources relied upon (*See*, Syl. Pt. 3, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014)), the memorandum decision in *Martin* addressed the very specific issue presented in this case - - that the general disability savings statute in West Virginia Code Section 55-2-15 does not toll the more specific two-year statute of limitations under the MPLA in West Virginia Code Section 55-7B-4. That specific issue was not addressed in the published *Mack-Evans* opinion, which addressed the general savings clause in context of actions under West Virginia Code Section 55-7-8a. Therefore, there is no conflict between *Mack-Evans* and *Martin*, and this Court correctly relied upon the more recent, specifically applicable memorandum opinion in *Martin*.

**c. Application of Discovery Rule**

Lastly, Plaintiff claims that the Court erred in failing to apply the discovery rule to toll the statute of limitations until Robert Thompson's death on July 2, 2011. Under the discovery rule, a statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim. *See*, Syl. Pt. 4, *Gaither v. City Hosp. Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997); *see also*, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009). Plaintiff argues, and Defense counsel admits, that Robert Thompson was incompetent, and as such, could not have discovered his injuries.

In the *Martin* case, the Court found the "discovery rule" inapplicable due to the fact that the incompetent's legal representative was aware of his injuries. *See*, *Martin*, 2013 WL 2157698 \*2 n.3. Plaintiff attempts to distinguish *Martin* from the present case by asserting that Robert Thompson had no "legal representative" who could have acted on his behalf. Defendant responds that Plaintiff, Wanda Williams, was Mr. Thompson's medical power of attorney ("MPOA") and that her mother had been Mr. Thompson's original MPOA. Defendant states that, as MPOA, both Plaintiff and her mother had concerns regarding Mr. Thompson's care as early as 2009, which was sufficient to trigger an affirmative duty to make further inquiry into any additional facts surrounding the care rendered to Mr. Thompson by the Defendant.

Essentially, the parties' arguments depend on whether a MPOA is a sufficient "legal representative" to trigger the running of the MPLA statute of limitations, when the MPOA has awareness of an incompetent's care and treatment. Plaintiff maintains that a MPOA does not qualify as a "legal representative" that could bring a suit on the behalf of an incompetent. Defendant, on the other hand, argues that a MPOA or health care surrogate ("HCS") who is responsible for making healthcare decisions is sufficiently authorized to be on notice of any issues regarding negligent care and/or treatment of an incompetent resident.

At the hearing and in their supplemental briefs, the parties discuss *State ex rel. AMFM v. King*, 230 W. Va. 471, 740 S.E.2d 66 (2013). In that case, the West Virginia Supreme Court held that a HCS is not authorized to agree, on behalf of an incapacitated person, to submit future disputes to arbitration. The Court's decision cites and relies upon the statutory language limiting the authority of a HSC to make "health care decisions" on behalf of an incapacitated person for whom the HCS has been appointed. Syl. Pts. 6-7, *King*, 230 W. Va. 471, 740 S.E.2d 66, *citing* W. Va. Code §§ 16-30-1, *et seq.* Plaintiff relies on footnote 9 of the *King* opinion, in which the Court opines that the analysis also applies to a MPOA because both a HCS and a MPOA "have, as their sole function, the authority to make health care decisions on behalf of an incapacitated person." *King*, 230 W. Va. at 480 n.9, 740 S.E.2d at 75 n.9. Because their authority is limited to "health care decisions", Plaintiff contends that a MPOA such as the Plaintiff is not a "legal representative" as contemplated in the *Martin* case - - and therefore, Plaintiff's awareness of Mr. Thompson's care and treatment did not do anything to trigger an affirmative duty to investigate or the running of the statute of limitations.

In application, Plaintiff's position is untenable. A MPOA, such as the Plaintiff, who is responsible for making health care decisions for an incompetent, is a sufficient legal representative for purpose of being on notice of any issues regarding negligent care and/or treatment of the incompetent. This Court previously found the discovery rule inapplicable to this case due to the fact that Plaintiff and her mother, as Mr. Thompson's MPOAs, were aware of and expressed concern regarding Defendant's care of Mr. Thompson as early as 2009. Having considered the parties' supplemental briefs, the *King* case, and arguments of counsel, this Court does not find any reason to change its prior opinion or to grant Plaintiff a new trial. For the foregoing reasons, the "discovery rule" was properly found to be inapplicable in this case, and this Court properly applied the MPLA statute of limitations to all of Plaintiff's claims.

## 2. Punitive Damages

Plaintiff next alleges that this Court erred in granting Defendant's Rule 50 request for Judgment as a Matter of Law or Directed Verdict as to punitive damages. Specifically, on October 29, 2014, this Court entered its Order Granting Defendants' Motion for Directed Verdict Regarding Punitive Damages [Doc. No. 305] (the "Punitive Damages Order"), which is incorporated herein by reference. In the Punitive Damages Order, this Court carefully considered (a) the standard for granting a Rule 50 motion and (b) the law governing an award of punitive damages. With those standards in mind, this court weighed all of the evidence presented at trial and found that Plaintiff failed to produce any evidence upon which a reasonable jury could base an award of punitive damages. Therefore, the Court concluded that "there is no legally sufficient evidentiary basis for a reasonable jury to find" (W. Va. R. Civ. P. 50(a)(1)) that "[D]efendant acted with wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights" of Robert Thompson. *See*, Syl. Pt. 7, *Michael v. Sabado*, 192 W. Va. 585, 453 S.E.2d 419 (1994). Accordingly, this Court exercised its discretion and granted Defendant's motion. *See, Sabado*, 192 W. Va. at 601, 453 S.E.2d at 435 (affirming trial court refusal to instruct jury on punitive damages "because the trial court did not think the evidence presented warranted such an instruction and out of fear the instruction would inflame the jury").

Plaintiff now renews the same arguments made at the time of trial, namely that a legally sufficient evidentiary basis did exist for a reasonable jury to find in favor of Plaintiff on the issue of punitive damages. Having considered Plaintiff's Motion, the Court finds that Plaintiff has not cited any evidence or law overlooked by the Court in entering the Punitive Damages Order. Therefore, the Court does not find any reason to alter its prior opinion. Even when the evidence presented at trial is considered in the light most favorable to the Plaintiff, there is no legally sufficient evidentiary basis upon which a reasonable jury could have found that

Defendant “acted with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights” of Mr. Robert Thompson. *See*, Syl. Pt. 7, *Sabado*, 192 W. Va. 585, 453 S.E.2d 419.

3. **Surveys from outside the MPLA statute of limitations period**

Plaintiff next contends that this Court erred in limiting the admissibility of Surveys conducted at the Defendant facility to those that were conducted within the MPLA statute of limitations period. Plaintiff claims that those surveys conducted outside of the MPLA statute of limitations period (specifically, surveys from June 2009 and November 2009) showed notice and knowledge of various problems allegedly occurring at the facility. Therefore, Plaintiff argues that the probative value of such Surveys would outweigh any potential prejudice.

This Court properly excluded Surveys occurring prior to April 19, 2011, the MPLA statute of limitations period. First, the Surveys Plaintiff sought to admit, from June and November 2009, did not identify any deficiency whatsoever with regard to the care and treatment rendered to Mr. Thompson. Neither Survey imputes to Defendant knowledge or notice of specific conditions alleged to have harmed Mr. Thompson. Moreover, the deficiencies that were cited in the Surveys were not determined to have caused any actual harm to the residents involved, and they were found to have been rare occurrences. Therefore, the incidents cited in the Surveys do not demonstrate that the Defendant had knowledge or notice of the issues allegedly resulting in harm to Mr. Thompson. As such, any probative value would have been outweighed by the danger of unfair prejudice, and the Court properly excluded the Surveys occurring prior to April 19, 2011.

#### **4. Defendant's Expert's Testimony**

Finally, Plaintiff claims that this Court erred in allowing Defendant's expert, Dr. Vincent DeLaGarza to provide (a) testimony regarding another, unidentified patient; and (b) testimony regarding a device known as a "Posey Vest," along with the admission of a demonstrative aid that lacked proper foundation. Plaintiff claims that this testimony improperly influenced the jury and warrants a new trial.

First, during Dr. DeLaGarza's testimony, he testified regarding patients falling and hurting themselves and stated "I mean, just last week one of my patients fell and – and just like Mr. Thompson's case. . ." The Court overruled an objection, and Dr. DeLaGarza continued testifying about an another patient that fell and how this happens "over and over again." Plaintiff contends that this was error because Plaintiff had no information about these other patients and their circumstances, and the testimony was irrelevant to what happened to Mr. Thompson. Defendant contends that Dr. DeLaGarza's testimony about other patients was relevant to establishing Dr. DeLaGarza's expert qualifications as to his experience with the care and treatment of patients similarly situated to Mr. Thompson.

Next, Plaintiff objects to Dr. DeLaGarza's testimony about and demonstrative use of a "Posey Vest." During his testimony, Dr. DeLaGarza testified regarding this alternative restraint device, which would hold a patient against a chair. As part of his testimony, Dr. DeLaGarza put on a "Posey Vest," showing how it would go over and across the body. Plaintiff argues that this testimony was prejudicial, even though there was no evidence that a "Posey Vest" was used or available at the Defendant nursing home or that one was ever used on Mr. Thompson. The Defendant responds that Dr. DeLaGarza testified about the "Posey Vest" to explain to the jury that the Defendant properly used the "lap buddy" as a restraint device because other alternatives, such as the "Posey Vest," would have been unduly restrictive and would have reduced Mr. Thompson's quality of life.

Having reviewed the parties' arguments and evidence presented, this Court does not find that Dr. DeLaGarza's testimony or use of the demonstrative aid was so unduly prejudicial as to warrant a new trial.

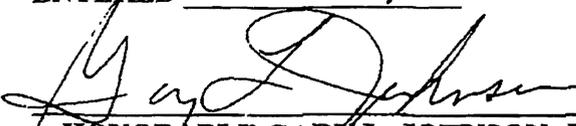
For all of the foregoing reasons, this Court does not find that the Plaintiff is entitled to a new trial in this matter. Accordingly, based upon the above facts, discussion and conclusions of law, the Court does hereby **ORDER**:

1. That Plaintiff's Motion for New Trial is hereby **DENIED**, and
2. It is further **ORDERED** that the Clerk forward a certified copy of this Order to each of the following individuals:

Mark A. Robinson  
Ryan A. Brown  
Flaherty Sensabaugh Bonasso PLLC  
P.O. Box 3843  
Charleston, WV 25338-3843  
and

Peter J. Molinelli  
Quintairos, Preto, Wood & Boyer, PA  
4905 W. Laurel Street, 2<sup>nd</sup> Floor  
Tampa, FL 33607  
*Counsel for Defendants*

A. Lance Reins  
Amy J. Quezon  
McHugh Fuller Law Group, PLLC  
97 Elias Whiddon Rd.  
Hattiesburg, MS 39402  
*Counsel for Plaintiff*

ENTERED 5-11-15  
  
HONORABLE GARY L. JOHNSON, JUDGE

A true copy certified this  
11 day of May, 2015  
  
DEBBIE FACEMIRE CIRCUIT CLERK  
Nicholas County Circuit Court  
Summersville, WV 26651  
By \_\_\_\_\_ Deputy