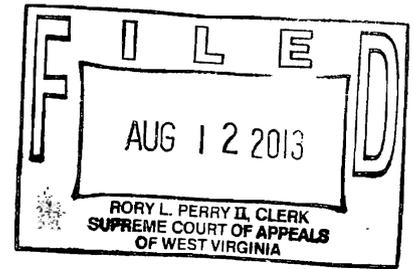


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' Brief

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ASSIGNMENTS OF ERROR

1. THE JURY VERDICT FORM WAS FATALLY FLAWED AND DEPRIVED THE DEFENDANTS OF A FAIR DECISION, CONSTITUTES PLAIN ERROR AND MANDATES A NEW TRIAL.
2. THE TRIAL COURT ERRED IN HOLDING THAT THE MEDICAL PROFESSIONAL LIABILITY ACT DID NOT PROVIDE THE EXCLUSIVE REMEDY FOR PLAINTIFFS' CLAIMS AGAINST DEFENDANTS.
3. THE TRIAL COURT ERRED IN FAILING TO DISMISS TOM DOUGLAS AS A PLAINTIFF IN HIS INDIVIDUAL CAPACITY.
4. THE TRIAL COURT ERRED IN ALLOWING PLAINTIFFS TO RECOVER FOR BREACH OF FIDUCIARY DUTY.
5. THE \$80 MILLION PUNITIVE DAMAGES AWARD SHOULD BE VACATED OR, AT A MINIMUM, SUBSTANTIALLY REDUCED.

STATEMENT OF THE CASE

This case arose from allegations of medical malpractice against a licensed healthcare provider, the Heartland nursing home in Charleston, West Virginia ("Heartland"). (J.A. 000180-000227; J.A. 000255 - 000320.) The decedent, Dorothy Douglas, was an 87-year old woman suffering from severe Alzheimer's dementia with behavioral disturbances, Parkinson's disease, coronary artery disease, depression, hypothyroidism, osteoporosis, and osteoarthritis, when she was admitted to Heartland on September 4, 2009, after a 16 day stay at River Park Hospital. J.A. 008482-008288.)

Ms. Douglas was a resident of Heartland for 19 days. She was subsequently transferred to another nursing facility in order to be closer to her family, and then to Cabell Huntington Hospital when her condition declined. *See* (J.A. 008345; J.A. 005422.) At Cabell Hospital, when Ms. Douglas refused oral medications, a feeding tube was discussed with the family in order to administer medications, but Ms. Douglas's son, Tom Douglas, declined the placement of a

feeding tube for his mother. (J.A. 004831.) Consequently, Ms. Douglas' family had her transferred to hospice care where all medical interventions and supportive measures were withdrawn, except for the administration of morphine to control pain. (J.A. 008479.) Ms. Douglas passed 18 days after she was transferred from Heartland as a consequence of her dementia. (J.A. 008460.)

Two Plaintiffs—Tom Douglas as an individual and the Estate of Dorothy Douglas—sued Defendant Health Care and Retirement Corporation of America, LLC, which held the license for Heartland nursing home, and the affiliated Defendants alleging that the healthcare provided to Ms. Douglas by healthcare providers, or that should have been provided to her, *and nothing else*, was inadequate. (J.A. 000180 - 000227; J.A. 000255 - 000320.) Plaintiffs sued pursuant to the West Virginia Medical Professional Liability Act (“MPLA”), but they also listed additional claims for breach of fiduciary duty, ordinary negligence, and for breach of the West Virginia Nursing Home Act (“NHA”) for healthcare services that were rendered to Ms. Douglas or which they allege should have been rendered to Ms. Douglas.

The jury trial of this matter, which began July 26, 2011 and concluded August 5, 2011, was rife with prejudicial errors. For example, the trial court adopted Plaintiffs' proposed verdict form that permitted the jury to award damages to non-parties and award duplicative damages for the same harm to Ms. Douglas. (J.A. 008502-008504.) The trial court permitted Tom Douglas to proceed with a claim in his individual capacity in contravention of clear West Virginia law governing wrongful death actions. Despite the absence of any legal or evidentiary support for a breach of fiduciary duty claim, the trial court allowed the Plaintiffs to base their fiduciary duty claim on the rendering of healthcare, creating a new cause of action in this state that will blow a gaping hole through the MPLA, effectively nullifying it. Additionally, the trial court mishandled

the consideration of punitive damages. This error was further exacerbated by the trial court's failure to reduce the punitive damages awarded pursuant to *Garnes v. Flemming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and federal due process limits.

The jury awarded Plaintiffs \$1.5 million for violations or deprivations of the NHA; \$5 million directly to Tom Douglas and Carolyn A. Douglas Hoy (Dorothy Douglas' daughter who was not a party); \$5 million to the Estate of Dorothy Douglas for breach of fiduciary duty; and \$80 million in punitive damages. (J.A. 008502-008504.) On October 20, 2011, over the objection of the Defendants, the trial court ordered that the jury verdict be entered as part of the record in this matter in the amount of \$91,094,615.22, plus post-judgment interest.¹ (J.A. 000011-000015.)

The Defendants filed a timely Motion for Judgment as a Matter of Law, or in the Alternative for New Trial, or in the Further Alternative for Remittitur. (J.A. 001758-001767; J.A. 008539-008620.) The Defendants also timely filed a Motion to Alter or Amend Judgment on Punitive Damages and Request for Hearing Pursuant to *Garnes v. Fleming Landfill*. (J.A. 001883-002241.) On April 10, 2013, the trial court denied both motions by entering Orders word-for-word as proposed by Plaintiffs.

SUMMARY OF ARGUMENT

The errors in the trial court's verdict form are legion and undeniably material. The verdict form proposed by the Plaintiffs, and adopted without modification by the trial court:

- without factual or legal basis, lumped four distinct Defendants together as a single amorphous group of "Defendants," a ploy of imprecision that allowed the Plaintiffs to introduce misleading evidence of the holding company's financial condition and foreclosed any opportunity for the jury to consider whether the holding company or any other Defendant breached any duty or caused any harm;

¹ The trial court reduced the original \$91.5 million jury verdict by applying the MPLA's \$594,615.22 cap not to the verdict as a whole but only to a \$1 million fragment of the verdict, yielding the \$91,094,615.22 amount.

- in contravention of settled West Virginia law, allowed the jury to award damages twice for the same injury simply because the Plaintiffs advanced two legal theories; and
- wrongly allowed the jury to award damages individually and directly to the heirs of the decedent, one of whom was not and had never been a party to the action in any respect, rather than to the decedent's estate.

These errors were so fundamental and so tainted the verdict that they alone justify a new trial.

The trial court also erred by failing to apply the MPLA, which provides the exclusive remedy for claims based on healthcare services that were rendered or should have been rendered by a healthcare provider like a nursing home. To evade the MPLA, Plaintiffs struggled mightily (and succeeded at trial) to circumvent the MPLA by pleading alternative legal theories, including “ordinary non-medical negligence,” breach of fiduciary duty and violation of the NHA. (J.A. 000180- 000227; J.A. 000255- 000320.) This Court has consistently called out such charades, and has applied the MPLA as it was intended to be applied—as the exclusive remedy for the provision of negligent healthcare. The trial court erred in failing to dismiss Plaintiffs’ non-MPLA claims and in failing to cap the judgment at the \$500,000 (plus inflation) allowed by the MPLA.

The trial court also erred by denying judgment as a matter of law in favor of the Defendants on all claims by the decedent’s son, Tom Douglas. Under West Virginia law, only the representative of the decedent’s estate can bring a claim under the Wrongful Death Statute. The children of decedents cannot sue or obtain damages apart from those awarded to the estate. The trial court erred by refusing to dismiss Mr. Douglas in his individual capacity and inexplicably held that its refusal at most amounted to harmless error—despite the fact the jury awarded \$5 million directly to Mr. Douglas (and his non-party sister). (J.A. 000024.)

And there is more. The trial court broke new ground by allowing the Plaintiffs to pursue (and the jury to award duplicative damages for) a purported “breach of fiduciary duty” that arose from personal injuries allegedly incurred through the provision of healthcare. The trial court was wrong to superimpose fiduciary obligations—the highest standards under law—on a healthcare provider’s duty to provide reasonable and prudent healthcare. Although there are certain circumstances regarding confidentiality or safeguarding of property where a healthcare provider could be charged with a fiduciary duty, neither this Court nor any other has allowed a fiduciary duty claim to stand under similar facts as a matter of state common law. Furthermore, allowing the fiduciary duty claim to survive in these circumstances would virtually nullify the MPLA. Why would any plaintiff elect to bring a medical malpractice claim governed by the MPLA’s requirements and caps when he or she could simply avoid the statute by dressing up the claim as one for breach of fiduciary duty?

Finally, the \$80 million punitive damages award should be vacated or substantially reduced. The trial court failed to abide by constitutional requirements to task the jury with determining whether each Defendant’s conduct was so egregious that it warranted punitive damages against that Defendant. The trial court also allowed the jury to focus on the holding company’s wealth even though Plaintiffs did not provide sufficient evidence to show that its conduct warranted punitive damages at all. Even if these serious errors were overlooked, the punitive damages are so vastly disproportionate to the compensatory damages that the punitive amount must be drastically reduced.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request Rule 20 argument in light of the importance of the issues presented in this case, particularly those associated with (1) submission of an improper verdict form;

(2) application of the MPLA to claims for breach of fiduciary duty, NHA violations, and ordinary negligence all arising from medical care that was rendered or which should have been rendered; (3) creation of a new cause of action in West Virginia; (4) submission of claims to the jury by a party who lacked standing; and (5) affirmation of an unconstitutionally inflated award of punitive damages.

STANDARD OF REVIEW

This Court reviews a ruling on a motion for new trial and a trial court's conclusion as to the existence of reversible error "under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 1 *Burke-Parsons-Bowlby Corp. v. Rice*, 230 W.Va. 105, 736 S.E.2d 338, 343 (2012). Similarly, this Court applies "an abuse of discretion standard when reviewing a trial court's decision regarding a verdict form." Syl. Pt. 4, *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010).

If this Court concludes that the complaining party did not object to an error at trial, "[t]he plain error standard of review requires error that is clear or obvious and that affects substantial rights which in most cases means that the error is of such great magnitude that it probably changed the outcome of trial." *State v. Omechinski*, 196 W.Va. 41, 47, 468 S.E.2d 173, 179 (1996) (internal citations omitted). The plain error doctrine applies when there is "(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." Syl. pt. 7, *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996).

ARGUMENT

I. The trial court abused its discretion in submitting a verdict form that was inconsistent with and contradictory to the law.

The jury verdict form conflicts with West Virginia law and federal due process. On that basis, this Court should reverse the judgment and order a new trial. *See Lively v. Rufus*, 207 W. Va. 436, 445, 533 S.E.2d 662, 671 (W. Va. 2000) (new trial is warranted when the trial court “abused its discretion in submitting to the jury an interrogatory that was inconsistent with and contradictory to the law and the jury instructions, and otherwise obtuse[.]”).

The errors in the verdict form are fundamental. *First*, without legal or factual basis, the verdict form permitted the jury to assess liability and damages against four separate corporate defendants by lumping them into an amorphous and undefined group of “Defendants.” (J.A.008502-008504.) *Second*, the verdict form enabled the jury to assess duplicative damages for “injury to Dorothy Douglas” caused by violations of the Nursing Home Act (\$1.5 million), and damages for “harm to Dorothy Douglas” caused by purported breach of fiduciary duty (\$5 million). *Third*, it permitted the jury to award damages directly to Ms. Douglas’s children, including a daughter who is not and never was a party to this lawsuit.

Any one of these errors demonstrates a reversible abuse of discretion. Taken together, the prejudice to the Defendants is overwhelming, and requires a new trial.

A. The verdict form disregarded the distinct corporate forms of each Defendant, and deprived each of its right to a separate determination of fault and damages.

The Plaintiffs brought this action against four distinct entities—Manor Care, Inc.; HCR Manor Care Services, Inc.; Health Care and Retirement Corporation of America, LLC d/b/a Heartland Nursing Home; and Heartland Employment Services, LLC. (J.A. 000180- 000227; J.A. 000255- 000320.) Each had separate corporate forms, roles, and responsibilities.

Nonetheless, the Plaintiffs' proposed verdict form lumped each Defendant into a single unit—"the Defendants"—against whom the jury was asked to (and did) assess liability, compensatory damages, and punitive damages in one fell swoop.² (J.A. 008502-008504.) In this regard, the verdict form was inconsistent with West Virginia and federal law, demonstrates an abuse of discretion, and requires a new trial.

Even after this Court ruled by extraordinary writ that the record should include Defendants' proposed jury verdict form, *State ex rel. Manor Care, Inc. v. Zakaib*, 2012 WL 3155746 (W.Va. 2012), J.A. 003764-003766, the trial court turned a blind eye towards this proposed jury verdict form's request for individualized findings on liability. Instead, the trial court's 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,

notes that the Defendants did not file a verdict form in the record of this matter at trial. Instead, 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 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.

(J.A. 000019-000020.) This glib treatment wholly ignores the first four pages of the Defendants' proposed jury verdict form that would have required the jury to make separate findings on liability and causation for each of the four Defendants. (*Id.* 001418-001421.)

It is well-settled that a defendant has a due process right to a hearing on the claims against him before he is deprived of property. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); *Wolff v. McDonnell*, 418 U.S. 539, 557-58

² The trial court erroneously stated that Defendants failed to preserve this issue. (J.A. 000019.) The court rejected the Defendants' proposed verdict form, and instead adopted the Plaintiffs' without modification. (*Id.* 008502, 005642.)

(1974) (a “hearing is required at some time before a person is finally deprived of his property interests”); *Bell v. Burson*, 402 U.S. 535, 541-42 (1971) (“The hearing required by the Due Process Clause must be meaningful,” and “a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard.”). The trial court deprived the individual Defendants of this hearing by allowing the jury to assess liability and punitive damages liability collectively against all of the Defendants.

That the Defendants are related corporate entities does not eliminate this fundamental requirement of due process. As a general matter, “corporations are separate from their shareholders,” Syl. Pt. 4, *T & R Trucking, Inc. v. Maynard*, 221 W. Va. 447, 655 S.E.2d 193 (2007), and have limited liability. In rare circumstances, a corporate veil may be pierced and a corporation held liable for the actions of its subsidiary, but Plaintiffs expressly disavowed pursuit of any such “piercing the corporate veil” theory in this case. (J.A. 001298) (“Plaintiff has not attempted to pierce the corporate veil but instead has alleged that these Defendants had direct liability due to their actions and involvement.”); J.A. 004515 (“It’s not by any means piercing the corporate veil.”)).

Even if Plaintiffs had not expressly forfeited any veil-piercing theory, they never attempted to satisfy the stringent legal requirements for veil-piercing. That analysis is guided by the nineteen factors enumerated in *Laya v. Erin Homes, Inc.*, including “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.” 177 W. Va. 343, 347-48, 352 S.E.2d 93, 98 (1986). The trial court did not find that Plaintiffs had satisfied the specific legal requirements for veil-piercing, nor did it instruct the jury regarding applicable law. (J.A. 000038-000039.) Instead, the trial court ruled in post-trial motions that the corporate parent

could be held directly liable based solely on evidence that Manor Care, Inc. owned and controlled the other three Defendants, all four Defendants were described as being “in the ‘business of the operation of nursing homes’” and operated under single trade name (“HCR Manor Care”), and all of the Defendants had a single corporate representative and counsel at trial, along with general testimony by certain corporate employees that they were “responsible” for the operation of the nursing homes. (*Id.*) The trial court erred by allowing Plaintiffs to circumvent settled principles of law and pierce Manor Care, Inc.’s corporate veil based on these assorted observations, untethered from the actual legal standard.

As this Court has held, “the corporate form will never be disregarded lightly. The mere showing that one corporation is owned by another or that they share common officers is not a sufficient justification for a court to disregard their separate corporate structure. Nor is mutuality of interest, without the countermingling of funds or property interests, or prejudice to creditors, sufficient.” *Southern States Co-op., Inc. v. Dailey*, 167 W. Va. 920, 929, 280 S.E.2d 821, 827 (1981) (cited authority omitted). This Court also rejected a veil-piercing argument premised on similar facts in *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”). Because the Defendants are each separate entities, they had a due process right to a separate determination of their individual liability, if any.

In addition, the MPLA expressly requires a jury to answer special interrogatories that determine the “percentage of fault, if any, attributable to each of the defendants.” W. Va. Code § 55-7B-9(a)(5). The MPLA also requires a court to enter any judgment “of several, but not

joint, liability against each defendant in accordance with the percentage of fault attributed to the defendant by the trier of fact.” *Id.* § 55-7B-9(c).

Neither of these mandated events occurred in this case. Instead, the Plaintiffs overreached by seeking and obtaining a verdict that found the operator of the nursing home and its parent companies *equally* liable for *different* conduct. And as discussed more fully in Part XX, this strategic imprecision allowed the Plaintiffs to introduce misleading, improper and incomplete “evidence” of the holding company’s financial condition when the verdict form foreclosed any opportunity for the jury to consider whether the holding company itself had breached any duty or caused any harm.

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

Applicable law regarding duplicative damages is clear and well-settled: “[C]ourts can and should preclude double recovery.” *EEOC v. Waffle House*, 534 U.S. 279 (2002); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980). True to this principle, this Court has held that “there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. *A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.*” *Harless v. First Nat’l Bank*, 169 W. Va. 673, 696, 289 S.E.2d 692, 705 (1982) (quotations and citations omitted) (emphasis added).

The trial court erred by permitting exactly what this Court has refused to allow. The verdict form allowed the Plaintiffs to recover damages twice—once for breach of fiduciary duty, and once for a violation of the NHA—when the alleged damages all arose from the same injuries.

- Question No. 2 on the verdict form asked, “What is the amount of damages as a result of the Defendants’ violations or deprivations of the West Virginia Nursing Home Act.” (J.A. 008502.) These damages were

designed to compensate for the “injury to Dorothy Douglas” as stated in Question No. 1. (*Id.*)

In response, the jury awarded \$1.5 million.

- Question No. 7 asked the jury, “What amount of compensatory damages do you find Defendants must pay to the Estate of Dorothy Douglas for their breach [of fiduciary duty].” (*Id.* 008504.) These damages were designed to compensate the Estate for “harm to Dorothy Douglas,” as stated in Question No. 6. (*Id.* 008503.)

In response, the jury awarded \$5 million.

There is no plausible basis, other than to overreach and attempt to evade MPLA caps, to assert that the injuries sustained as a result of the claimed NHA violation are any different from the injuries sustained through any alleged breach of fiduciary duty. The injuries in this case were personal injuries, and the mere fact that the Plaintiffs pursued two distinct legal theories to obtain damages for these injuries does not entitle the Plaintiffs to recover twice for the same alleged conduct and injuries.

A verdict form that enabled the jury to award duplicative damages for the same injuries is contrary to the law and requires a new trial, or, at a minimum, a reduction of any duplicative damages awarded. *Harless*, 169 W. Va. at 696, 289 S.E.2d at 705.³

C. The verdict form enabled the jury to award damages to non-parties.

Under West Virginia’s wrongful death statute, the only real party in interest is the personal representative of the decedent. *Richardson v. Kennedy*, Syl. pt. 4, 197 W. Va. 326, 475 S.E.2d 418 (1996). Accordingly, the only proper plaintiff in this case was the Estate of Dorothy Douglas. But the verdict form permitted the jury to award damages directly to her children,

³ The trial court erroneously found that Defendants did not preserve this issue. (J.A. 000021.) That was error because Defendants specifically objected that the damages for breach of fiduciary duty would be duplicative. *See, e.g., (id.* 005625.) In any event, the trial court’s error amounts to plain error that should be corrected on appeal.

providing yet a *third* chance to recover damages, which was legally wrong and warrants a new trial.

Question No. 5 asked: “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?” (J.A. 008503.) It included a line item for damages that listed Mr. Douglas and Ms. Hoy, and the jury awarded them \$5 million. (*Id.*) This portion of the verdict form clearly disregarded the Wrongful Death Statute, as discussed in Argument Section III, *infra*, and allowed damages for a non-party (Ms. Hoy) and an improper party (Mr. Douglas as an individual). Mr. Douglas and Ms. Hoy have no individual claim to damages under West Virginia law separate from the estate.

The verdict form further confused the issue of damages because each question addressed damages to a different entity: Question No. 2 was silent as to who was to receive the damages (\$1.5 million) for the NHA claim; Question No. 5 authorized damages (\$5 million) directly to Mr. Douglas and Ms. Hoy rather than through the Estate; and Question No. 7 stated that the same amount of damages (\$5 million) for the flawed fiduciary duty claim were to be paid to the Estate. (J.A. 008502-008504.) The trial court’s jury instructions, by contrast, stated that the Estate of Dorothy Douglas was to receive all of the damages awarded. (*Id.* 005680-005682.)⁴ This clear error constitutes an abuse of discretion, and entitles the Defendants to a new trial.

⁴ The trial court provided the jury with this verdict form despite the fact that, at the charge conference, both it and the Plaintiffs’ counsel acknowledged it was wrong to award damages to Mr. Douglas and Ms. Hoy. (J.A. 005558-005559.) The Plaintiffs agreed to fix the error (*id.* 005559-005561), but never did so, and the trial court approved the verdict form over the Defendants’ objection (*id.* 005642).

II. The trial court erred by refusing to apply the MPLA provisions and caps due to Plaintiffs’ artful pleading.

The MPLA provides the exclusive remedy for *all* of Plaintiffs’ claims because they are *all* “based on” the provision of inadequate “health care” by “health care providers” Heartland nursing home and its staff. *See* W. Va. Code § 55-7B-2(e)-(g), (i). The trial court allowed Plaintiffs to evade the MPLA’s limits because they pleaded claims under additional causes of action (breach of fiduciary duty and NHA), postured a portion of their negligence claim as non-medical, and pleaded claims against additional parties (Heartland nursing home’s affiliates and parent companies). That was error. As this Court has held, the MPLA applies based on the *substance* of a plaintiff’s claims, and its limitations cannot be evaded by manipulating the form of pleadings. If the trial court’s contrary view were affirmed, it would create massive loopholes in the MPLA that would undermine its core purpose to ensure the continued availability of nursing home and other healthcare in West Virginia. This Court should reverse, dismiss Plaintiffs’ non-MPLA claims, and reduce the compensatory damages to the statutory cap amount of \$500,000 plus inflation. *Id.* § 55-7B-8(b)-(c).

A. The MPLA was designed to apply broadly and specifically to limit malpractice claims concerning nursing homes.

West Virginia has been facing a crisis in the availability of medical care—and particularly long-term healthcare provided by nursing homes—for decades. The legislature found in 1986 that “the cost of insurance coverage h[ad] risen dramatically while the nature and extent of coverage h[ad] diminished,” to the detriment of healthcare providers and injured citizens of West Virginia. *See Robinson v. Charleston Area Medical Ctr.*, 186 W.Va. 720, 414 S.E.2d 877 (1991). It enacted the MPLA to “provide for a comprehensive resolution” to this healthcare crisis by reforming “the common law and statutory rights of our citizens to

compensation for injury and death” as well as the insurance industry. *Id.* To that end, the new law limited the cause of action for medical negligence, required expert testimony, capped noneconomic damages at \$1 million, and codified a two-year statute of limitations, among other things. See T. Hurney & J. Mankins, *Medical Professional Liability Litigation in West Virginia: Part II*, 114 W. Va. L. Rev. 573, 576-77 (2011). In 2001, the legislature found that those reforms were not enough and amended the MPLA again to further limit malpractice claims. *Id.* at 577-580.

But those reforms still were not sufficient to curb the exodus of healthcare providers generally from West Virginia and nursing homes in particular. In 2003, the legislature found that “the cost of liability insurance coverage h[ad] continued to rise dramatically, resulting in the state’s loss and threatened loss of physicians.” W. Va. Code § 55-7B-1. It concluded that “medical liability issues h[ad] reached critical proportions for the state’s long-term healthcare facilities,” including the state’s nursing homes. *Id.* The legislature explained 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”; that the “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.* The legislature concluded that, absent further legislative limits on medical liability, the “crisis for nursing homes [could] soon result in a reduction of the number of beds available to citizens in need of long-term care.” *Id.* To prevent that from happening, the legislature amended the MPLA further to reduce the noneconomic damages cap to \$250,000 generally and \$500,000 in serious cases. It also required the expedited resolution of cases,

limited certain theories of causation, eliminated joint and several liability, modified expert qualifications, and limited actions by third parties. *See* Hurney, 114 W. Va. L. Rev. at 582.

The legislature recognized that the MPLA can achieve its purpose of limiting malpractice liability and assuring the continued availability of sufficient long-term healthcare in West Virginia only if the statute completely occupies the field of malpractice claims. The legislature therefore defined the scope of the MPLA's coverage broadly, with application to "all causes of action alleging medical professional liability." W. Va. Code § 55-7B-10(b). The term "medical professional liability," moreover, is not limited to traditional medical negligence actions. It includes "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on healthcare services rendered, or which should have been rendered, by a healthcare provider or healthcare facility to a patient." *Id.* § 55-7B-2(i) (emphasis added).

B. All of Plaintiffs' claims are covered by the MPLA.

All of Plaintiffs' claims fall within the MPLA's broad definition of "medical professional liability." Plaintiffs nonetheless artfully evaded the MPLA's limitations below by expanding both the type of *claims* they alleged and the *parties* against whom they filed suit. This Court should reject both of those evasive strategies and apply the MPLA, as intended, to all of Plaintiffs' claims.

1. All claims are "based on" "health care services" as defined by the MPLA.

Contrary to the trial court's understanding, all of Plaintiffs' claims are "based on" "health care services" that were rendered or should have been rendered. At bottom, Plaintiffs contend that Heartland's failure to adequately care for Ms. Douglas resulted in her death. That claim falls squarely within the MPLA. Plaintiffs have tried to escape that conclusion, however, by pleading three separate legal claims: (1) violation of the NHA; (2) negligence; and (3) breach of fiduciary duty. That strategy worked below but should fail here, because this Court has held that the

“failure to plead a claim as governed by the Medical Professional Liability Act, W. Va. Code §55-7B-1, *et seq.*, does not preclude application of the Act.” Syl. Pt. 4, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007). Instead, the MPLA applies “regardless of how the claims have been pled.” *Id.* The dispositive question is whether “the alleged tortious acts or omissions are committed by a healthcare provider within the context of the rendering of ‘health care.’” *Id.* When they are, the MPLA is the “exclusive remedy.” *Id.* at 705.

Here, all three claims are premised on the care that Ms. Douglas received or should have received at Heartland. The trial court’s fiduciary duty instruction asked whether Defendants “fail[ed] to provide the appropriate level of care and services” to which Ms. Douglas was entitled. (J.A. 005680.) Plaintiffs argued in closing that “a violation of th[e] very same regulations” upon which they based their NHA claim “is evidence[] that [Defendants] were negligent.” (*Id.* 005718.) And, for all claims, the only injuries Plaintiffs identified were her suffering while at Heartland nursing home, and her death.

The care that Ms. Douglas received at Heartland nursing home that Plaintiffs claim led to her injury and death unquestionably qualifies as “health care.” The MPLA defines “health care” as “any act or treatment performed or furnished, or which should have been performed or furnished, by any healthcare provider for, to or on behalf of a patient during the patient’s medical care, treatment or confinement.” W. Va. Code § 55-7B-2(e). On its face, that definition is sufficiently broad to cover “any act” by Heartland nursing home and its agents “for, to or on behalf of” Ms. Douglas during her “confinement” at the nursing home.

This Court has recognized that some conduct by healthcare providers “unrelated to providing medical care” does not qualify as “health care.” *Blankenship*, 221 W. Va. 707. For example, the Court has explained that fraud, spoliation of evidence, negligent hiring, intentional

assault, stealing, and defamation of a patient do not qualify as “health care” subject to the MPLA. *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W. Va. 656, 662-63, 609 S.E.2d 917 (2004). Nor does improper disclosure of medical records. *R.K. v. St. Mary’s Medical Center, Inc.*, 229 W.Va. 712, 735 S.E.2d 715, 719 (2012). But the Court has, at the same time, emphasized that all conduct related to patient care is covered. Syl. Pt. 4, *Blankenship*, 221 W. Va. 707. Indeed, the Court held that even claims of sexual assault that “could possibly be construed as having occurred within the context of the rendering of healthcare services” is subject to the MPLA. *Gray v. Mena*, 218 W. Va. 564, 570, 625 S.E.2d 326 (2005).

The trial court did not find, and Plaintiffs have not seriously contended, that the direct care Ms. Douglas received was “unrelated to” and could not “possibly be construed” as having occurred during the provision of medical care. Nor could they. The term “health care facility” specifically includes “nursing home,” W. Va. Code § 55-7B-2(f), and the point of a nursing home is to provide long-term healthcare to patients who can no longer care for themselves. In opening statements, counsel argued that the caregivers did not adequately feed, give water to, clean, or reposition Ms. Douglas to avoid bed sores. (*See, e.g.*, J.A. 004103-004104.) In closing, counsel argued that the caregivers did not adequately supervise Ms. Douglas—a dementia patient—who had fallen. (*See, e.g., id.* 005715.) Counsel argued that caregivers did not “provide her sufficient fluid intake to maintain proper hydration and health.” (*Id.* 005716.) And counsel argued that they did not call a doctor quickly enough when her health started to deteriorate. (*Id.*) This is precisely the type of specialized long-term healthcare that nursing homes provide. Plaintiffs themselves have recognized as much—in their Amended Complaint, they alleged that these very same deficiencies constituted “medical malpractice. (*See id.* 000294, 0000299, ¶¶ 87, 96.)

Below, Plaintiffs made three arguments to the contrary, which the trial court accepted. (*Id.* 000018-000019.) This Court should reject all three. First, Plaintiffs distinguished between the “medical” care and the “ordinary” care provided at the nursing home, and the trial court allowed the jury to divide Plaintiffs’ negligence cause of action by assessing the percentage of medical and ordinary negligence. That sort of apportionment has no basis in the statute, which applies 100% to suits based on the provision of “health care” regardless of whether aspects of the conduct at issue could, in different contexts, be described as ordinary negligence.⁵ In *Short v. Appalachian OH-9*, 203 W. Va. 246, 507 S.E.2d 124 (1998), for example, the Court held that claims based on EMTs’ and paramedics’ emergency care of an infant, including their late arrival, failure to continue resuscitation efforts, and failure to contact a doctor, *all* constituted “health care” under the MPLA. The same is true here. Contrary to Plaintiffs’ attempts to equate the services provided by Heartland nursing home to those afforded by a hotel or cafeteria, decisions about the mobility, feeding, and hydration of an 87-year old nursing home resident like Dorothy Douglas, who was admitted with severe Alzheimer’s dementia, Parkinson’s disease, coronary artery disease, depression, hypothyroidism, osteoporosis, and osteoarthritis are part and parcel of the nursing home’s provision of healthcare services to that patient.

Second, Plaintiffs contended that the corporate decisions of Heartland nursing home and its parent companies relating to staffing do not qualify as “health care.” (J.A. 000018.) That argument is a red-herring. In order to implicate Heartland nursing home’s corporate parents in this case, Plaintiffs claim that budgetary decisions up the line resulted in inadequate staffing of the nursing home, and caused inadequate care at the facility. (*See, e.g., id.* 005704.) But

⁵ Allowing the jury to parse the claim in this way was also error because the issue of whether a claim is covered by the MPLA is a legal issue. *R. K.*, 229 W.Va. 712, 735 S.E.2d at 718 (“Additionally, St. Mary’s, by way of a cross assignment of error, asks this Court to review the circuit court’s ruling that R.K.’s allegations are not governed by the MPLA. This issue presents a purely legal question that involves the interpretation of a statute.”).

regardless of whether Ms. Douglas’s injuries can be traced to upstream budgeting decisions—and they cannot (*see infra* at 32)—Plaintiffs’ claim is at bottom a claim for liability “based on” the care Ms. Douglas ultimately received in the nursing home—*i.e.*, “based on health care services rendered . . . by a health care provider or health care facility to a patient.” W. Va. Code § 55-7B-2(i).⁶

Third, Plaintiffs have argued that the NHA is not limited by the MPLA because its remedies are “in addition to all other penalties and remedies provided by law.” *Id.* § 16-5C-15(d). But that text means only that the NHA did not *displace* other common law and statutory remedies. It does not immunize claims alleged under the NHA from the limitations of the MPLA, which apply to *all* causes of action “based on” health care services. Interpreting the two statutes otherwise would nullify the legislature’s specific intent when it amended the MPLA in 2003 (after the enactment and amendment of the NHA) to ensure that the MPLA limits would prevent excessive verdicts against nursing homes. *See supra* at 15-16. Plaintiffs themselves conceded below that some NHA claims would be covered by the MPLA, (J.A. 001786), and properly recognized that NHA claims are not categorically immune from the MPLA’s limits.

If there were any doubt about that conclusion, the legislature eliminated it through Senate Bill 101 in 2013. That law, which went into effect on July 1, 2013, amended the NHA, W. Va. Code § 16-5C-15(g), to provide expressly that “[n]othing in [the NHA] or any other section of the code shall limit the protections afforded nursing homes or their healthcare 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].*” W. Va.

⁶ In accepting Plaintiffs’ argument, the trial court misunderstood and improperly treated as binding Justice Davis’s concurrence in *Riggs v. West Virginia University Hospitals, Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007). The critical fact for Justice Davis that took that case outside the MPLA was that the duty breached ran to nonpatients; there is no argument here that alleged understaffing harmed nonresidents.

Code. § 16-5C-15(g) (emphasis added). The legislature made clear that the amendment does not revise or modify the original terms of the MPLA, but was intended to “clarify that the Legislature *originally* intended that the Medical Professional Liability Act applies to nursing homes and health care providers.” S.B. 101, Note, at 7 (emphasis added). This amendment confirms that the MPLA applies fully to claims asserted under the NHA, and that plaintiffs cannot use the NHA to end-run the limits imposed by the MPLA.

2. All healthcare services at issue were rendered by a “health care provider” as defined by the MPLA.

The MPLA applies to Plaintiffs’ claims against all of the Defendants because the healthcare services at issue were rendered by “health care providers.” W. Va. Code § 55-7B-2(i). Both the Heartland nursing home facility and its staff are “health care providers.” As the trial court found, Health Care and Retirement Corporation of America, LLC, d/b/a Heartland Nursing Home is plainly a “health care facility” because it holds the license for Heartland nursing home and therefore is a “nursing home” “in and licensed by the State of West Virginia.” *Id.* § 55-7B-2(f); (J.A. 000017-000018). Heartland nursing home thus also qualifies as a “health care provider,” which includes “health care facilit[ies].” *Id.* § 55-7B-2(g). In addition, the direct caregivers at Heartland nursing home are “health care providers” because they are “agent[s]” of a “health care facility” (Heartland nursing home) that are “acting in the course and scope of such. . . agent[s]’ employment.” *Id.*

The trial court found that the other Defendants—Manor Care, Inc., HCR Manor Care Services, Inc., and Heartland Employment Services, LLC—did not qualify for the protection of the MPLA because they are not “health care provider[s].” (J.A. 000017.) The trial court was right that they are not “health care providers” because they *do not provide healthcare at all*. But it drew the wrong conclusion. That fact should have led the trial court to conclude that those

companies cannot be liable for the healthcare provided to Ms. Douglas, not that they can be held liable for the provision of healthcare to her without regard to the MPLA's limitations on damages. One corporation is not liable for the actions of agents of a *different* corporate entity—here, the health care provider. *Southern Elec. Supply v. Raleigh. Cty. Nat. Bank*, 173 W. Va. 780, 788, 320 S.E.2d 515, 523 (1984).

Regardless of how they dress up their claims, Plaintiffs' insistence that the affiliates and upstream owners can be held liable for the actions or failures to act of Heartland nursing home and its agents is a claim of *vicarious* liability. See *Adkins v. Hunt*, 200 W.Va. 717, 490 S.E.2d 802 (1997). As we explain, *see infra* at XX, this claim must fail both because Plaintiffs unequivocally abandoned any claim for vicarious liability and because they consequently made no attempt to meet the proof required to pierce Heartland nursing home's corporate veil. But even if Heartland's affiliates could be held vicariously liable, their liability could not exceed Heartland nursing home's liability, as limited by the MPLA. Other courts have applied medical malpractice caps to non-healthcare providers under this reasoning. See *Ruiz v. Oniate*, 713 So. 2d 442 (La. 1998); *Lathrop v. Healthcare Partners Medical Group*, 114 Cal. App. 4th 1412 (1st Dist. 2004).

Plaintiffs' contrary arguments are flatly inconsistent with the purpose of the MPLA and if accepted would create gaping loopholes that would entirely undermine its function. If Plaintiffs' view were adopted, a plaintiff could always avoid the procedural requirements, the damages cap, and the substantive requirements of proof simply by renaming causes of action, characterizing portions of claims as "ordinary" negligence, and suing the corporate parent of the direct caregiver. The MPLA would have no real force and West Virginia would be subject to a mass exodus of nursing homes and other healthcare providers fleeing to avoid the unlimited liabilities

the MPLA was enacted to constrain. This Court rejected arguments with similar consequences in *Blankenship* and should do the same here.

C. The appropriate remedy is to dismiss the non-MPLA claims and apply the damages cap to Plaintiffs' MPLA claim.

This Court should reverse the trial court's denial of Defendants' motion for judgment as a matter of law with instructions for the trial court to dismiss Plaintiffs' non-MPLA claims and to apply the \$500,000 (\$594,615 after inflationary adjustment) damages cap to Plaintiffs' MPLA claim.⁷ In other cases (*Blankenship*, 221 W. Va. at 708; *Gray*, 218 W. Va. at 570), this Court has remanded for the plaintiff to comply with the MPLA. That is unnecessary here because Plaintiffs have already received a judgment for the full amount allowed under the MPLA for the actions at issue.

III. The trial court erred by denying the Defendants judgment as a matter of law on all claims by Tom Douglas individually.

The trial court never concluded that Tom Douglas was a proper plaintiff in his individual capacity. Instead, the trial court rejected the Defendants' argument for his dismissal by concluding that the Defendants did not object or otherwise seek to dismiss Mr. Douglas before the verdict was reached. (J.A. 000024.)

The trial court was wrong. Defendants filed a written motion to dismiss Tom Douglas in his individual capacity on August 4, 2011, the day before the verdict returned. (*Id.* 001304-001307). The trial court failed to address that motion, and then compounded its error by ruling, post-trial, that Defendants waived the issue. (*Id.* 000024.)

Tom Douglas had no legal right to bring this action on his own behalf or to recover damages. Under West Virginia law, any claim raised for damages from conduct resulting in the death of Dorothy Douglas was required to be made under West Virginia Code § 55-7-5. *White v.*

⁷ The cap applies to all of the compensatory damages in this case because they are noneconomic.

Gosiene, 187 W. Va. 576, 583, 420 S.E.2d 567, 573 (1992) (“[A] wrongful death action did not exist at common law and is a creature of the legislature.”). Only a decedent’s personal representative may proceed with a claim under West Virginia’s Wrongful Death Statute, which unambiguously states that “[e]very such action shall be brought by and in the name of the personal representative of such deceased person who has been duly appointed . . . [.]” W. Va. Code § 55-7-6(a). Courts have recognized the same. *See, e.g., Perry v. Pocahontas Coal Co.*, 74 W. Va. 122, 81 S.E. 844 (1914) (Wrongful death “action is one which by the terms of the statute can only be maintained in the name of his administrator”); *see also Jones v. George*, 533 F. Supp. 1293, 1307 (S.D. W. Va. 1982) (“Plaintiff shall be dismissed in her individual capacity. She may only pursue a wrongful death claim as the duly appointed personal representative of the decedent’s estate.”).

Apart from the Wrongful Death Statute, no mechanism exists for adjudicating a decedent’s survivable claims in West Virginia; a personal representative’s action is designed to provide compensation for a decedent’s next of kin, so a personal action by related individuals is neither necessary nor permitted. West Virginia law simply does not confer jurisdiction on anyone other than the personal representative to maintain a claim for wrongful death. *Adams v. Grogg*, 153 W. Va. 55, 166 S.E.2d 755 (1969), overruled on other grounds by *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976). Accordingly, the trial court erred by denying the Defendants’ motion for judgment as a matter of law with respect to Mr. Douglas’s claims.

The trial court also inexplicably held that “nothing material would have changed” if Tom Douglas was dismissed in his individual capacity. (J.A. 000024.) That was error. A Civil Procedure Rule 12(h)(3) issue is always preserved, never waived, and never frivolous because the trial court lacked jurisdiction over the claim as it pertained to Tom Douglas individually.

Moreover, allowing Tom Douglas to proceed as an individual was neither inconsequential nor harmless because the jury awarded \$5,000,000 in damages to Tom Douglas individually (with Carolyn Hoy), not the Estate. (J.A. 008503.) Thus, the unlawful inclusion of Tom Douglas in this lawsuit was not harmless error. To the contrary, it led to confusion of the jury as they considered multiple claims and multiple recipients of damages. Allowing Tom Douglas to proceed individually as a Plaintiff created the misconception for the jury that it had two groups to compensate, and that some claims involved wrongs to Ms. Douglas and her Estate and that other claims involved wrongs to the survivors. This error prompted the jury to award damages on multiple claims to compensate multiple Plaintiffs, thus unlawfully replicating damages. Accordingly, this Court should reverse and dismiss Tom Douglas as a Plaintiff in his individual capacity.

IV. The trial court erred by denying judgment as a matter of law to the Defendants on Plaintiffs' breach of fiduciary duty claim.

The jury awarded the Estate of Dorothy Douglas \$5 million for a purported breach of fiduciary duty. There is no legal or evidentiary support for a breach of fiduciary duty claim under the facts of this case. On this basis, this Court should reverse the trial court's judgment order, and direct the entry of judgment in the Defendants' favor on that claim. Syl. Pt. 5, *Starr v. State Farm Fire & Cas. Co.*, 188 W. Va. 313, 423 S.E.2d 922 (W. Va. 1992) ("When, upon the trial of a case, the evidence decidedly preponderates against the verdict of a jury or the finding of a trial court upon the evidence, this Court will, upon review, reverse the judgment.") (internal quotations and cited authority omitted).

A fiduciary duty is a "duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law." *Elmore v. State Farm Mut. Automobile Ins. Co.*, 202 W.Va. 430, 435, 504 S.E.2d 893, 898

(1998) (quoting Black's Law Dictionary 625 (6th ed. 1990)). A fiduciary relationship exists "whenever a trust, continuous or temporary, is specially reposed in the skill or integrity of another." *McKinley v. Lynch*, 58 W.Va. 44, 57, 51 S.E. 4, 9 (1905). "As a general rule, a fiduciary relationship is established only when it is shown that the confidence reposed by one person was *actually accepted* by the other, and merely reposing confidence in another may not, of itself, create the relationship." *Elmore*, 202 W.Va. at 436, 51 S.E.2d at 899 (quoting C.J.S. Fiduciary at 385 (1961)) (emphasis added).

In this case, there was no evidence that any Defendant undertook a duty to act for the benefit of Ms. Douglas while subordinating its own interest to hers. Instead, there was a contractual relationship between Ms. Douglas and Defendant Health Care and Retirement Corporation of America, LLC ("HCRCA"), which obligated HCRCA to provide healthcare services to Ms. Douglas in return for her payment for those services. (J.A. 006766 – 006805.) This purely contractual relationship created no fiduciary obligations on HCRCA's part, let alone the other three Defendants with whom Ms. Douglas had no contractual or fiduciary relationship. *See Elmore*, 202 W.Va. at 435, 504 S.E.2d at 900 (stating that an insurance company does not owe a fiduciary duty to its own insured because the relationship between parties to an insurance contract was more similar to a pure contractual relationship than to a trustee relationship).

Neither this Court nor any other has recognized a fiduciary duty claim for the provision of healthcare services. While this Court has recognized a fiduciary duty may exist between a healthcare provider and a patient, it has extended the parameters of that relationship only to a healthcare provider's duty to maintain confidentiality. *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 429, 446 S.E.2d 648, 651 (1994); *State ex rel. Kitzmiller*, 190 W.Va. 144, 437 S.E.2d at 454 (finding that "information is entrusted to the healthcare provider in the expectation

of confidentiality and the provider has a fiduciary obligation *in that regard*”) (emphasis added). Here, there was no claim or evidence that any Defendant failed to maintain the confidentiality of Ms. Douglas’s medical records, misappropriated her personal funds, or entered into a financial transaction with her beyond the foundational contract for healthcare services.

The trial court erroneously relied on the definition of fiduciary relationship found in the Restatement (Second) of Torts, § 874. (J.A. 000023.) That authority cites to the Restatement (Second) of Trusts, § 2, which described fiduciary relations as extending to:

the relation of trustee and beneficiary, . . . guardian and ward, agent and principal, attorney and client. Each member of a partnership is in a fiduciary relation to the other partners. The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations. . . .

Id. § 2(a) (emphasis added). This definition of fiduciary relationship plainly does not contemplate such a relationship being formed by the rendering of healthcare pursuant to a contract with a nursing home.

Likewise, the trial court’s citation to West Virginia Code § 33-1-10(e)(9) to support the fiduciary duty claim was incorrect. (J.A. 000023.) That code section does not define fiduciary duties. Rather, it defines malpractice insurance, and provides:

Malpractice insurance, which is insurance against legal liability of the insured and against loss, damage or expense incidental to a claim of such liability, and including medical, hospital, surgical and funeral benefits to injured persons, irrespective of legal liability of the insured arising out of the death, injury or disablement of any person, or arising out of damage to the economic interest of any person, as the result of negligence in rendering expert, fiduciary or professional service[.]

W.Va. Code § 33-1-10(e)(9) (emphasis added). The services at issue in this case were healthcare services or “professional” services, not “fiduciary” services.

In short, the sole basis of the claimed fiduciary relationship was that Ms. Douglas was a resident at Heartland nursing home. (J.A. 000310, ¶ 125.) Nothing in the record or the law

supports the conclusion that Heartland nursing home had or breached a fiduciary obligation to Ms. Douglas. And nothing supports the conclusion that Manor Care, Inc., HCR Manor Care Services, Inc., or Heartland Employment Services, LLC owed any obligation whatsoever to the Plaintiffs—yet the trial court entered judgment against those entities on the fiduciary duty claim.

This is not to say that Heartland nursing home owed no duty to Ms. Douglas. It owed her the duty of care, established in the MPLA, “to exercise that degree of care, skill and learning required or expected of a reasonable, prudent healthcare provider in the profession or class to which the healthcare provider belongs acting in the same or similar circumstances.” W. Va. Code § 55-7b-3. But any claim for a breach of that duty is subject to the MPLA caps—precisely the reason the Plaintiffs again overreached, this time by trying to jam the square peg of a medical negligence claim into the round hole of a fiduciary duty claim. This is nothing more than a transparent effort to evade the careful limitations of the MPLA and to nullify its provisions.

This Court should reverse the trial court and direct the entry of judgment in the Defendants’ favor on Plaintiffs’ fiduciary duty claim.

V. The \$80 million punitive damages award should be vacated or, at a minimum, substantially reduced.

At trial, Plaintiffs focused relentlessly on the wealth of Manor Care, Inc.—the corporate grandparent of Heartland nursing home—and insisted that a massive punitive damages award was necessary to teach a lesson to what they characterized as a multi-billion dollar corporation. On the strength of that argument, the jury assessed \$80 million in punitive damages jointly against *all* Defendants.

This punitive damages award should be vacated and set for re-trial for two reasons: *first*, the trial court failed to task the jury to make the constitutionally required determination whether each individual Defendant’s conduct was so egregious that it warranted punitive damages against

that Defendant; and, *second*, the trial court improperly permitted the jury to consider Manor Care, Inc.'s wealth in determining the amount of punitive damages for all Defendants, even though Plaintiffs did not prove that Manor Care, Inc.'s conduct warranted any punitive damages at all. Even if the punitive damages award is not vacated, the award must be drastically reduced because the amount awarded is vastly disproportionate to the compensatory damages and to the amount of civil penalties sanctioned by legislatures for similar conduct.

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

A defendant may be liable for punitive damages only if his conduct rises to the level of “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others.” Syl. Pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); W. Va. Code § 16-5C-15(c) (the NHA authorizes punitive damages for conduct that is “willful or in reckless disregard of the lawful rights of the resident”). Further, because the purpose of punitive damages is to punish a wrongdoer “individually” for his actions, it is settled law that “each defendant” is “answerable alone and separately” for punitive damages. *Burgess v. Porterfield*, 196 W. Va. 178, 182, 183 n.9, 185, 469 S.E.2d 114, 118, 121 n.9 (1996). Other courts have also recognized this principle.⁸ Even the trial court appears to have recognized the necessity of individual punitive liability findings. The court instructed the jury here that it “may assess punitive damages” if it found that “a Defendant’s conduct was such that punitive damages are warranted, that is, that *the particular* Defendant’s acts or omissions” satisfy the *Mayer*

⁸ See *Sanchez v. Clayton*, 117 N.M. 761, 766 (1994) (“punitive damages against two or more defendants must be separately determined”); *York v. In Trust Bank, N.A.*, 265 Kan. 271, 313-14 (1998) (“imposition of joint and several liability for punitive damages is contrary to the purpose for which punitive damages are awarded”); 25 C.J.S. Damages §210 (“In an action against several defendants, exemplary damages may be awarded against those, and only against those, who have participated in, or contributed to, the malicious act or the gross negligence involved.”).

standard. (J.A. 005684.) (Emphasis added). But the court failed to follow that direction through in the jury’s verdict form.

Defendants proposed a verdict form that would have required the jury to separately indicate whether each Defendant’s conduct individually warranted punitive damages under *Mayer*. (J.A. 001418-001421.) But the trial court instead used Plaintiffs’ verdict form over Defendants’ objection.⁹ (J.A. 005642.) As explained in Part II.A above, that form lumped all of the Defendants together, and asked the jury to state whether it found “by the preponderance of the evidence that punitive damages are warranted against the Defendants.” (J.A. 008503.)

The jury therefore was never asked to indicate—and did not separately find—whether each Defendant’s individual conduct justifies punitive damages under *Mayer*. That was reversible error because it violated each Defendant’s due process right to an individual determination of liability (*see supra* at Part II.A, and *Mayer*), and was inconsistent with the jury instructions. *See Lively*, 207 W. Va. at 445 (use of verdict form “inconsistent with and contradictory to the law and the jury instructions” amounts to “reversible error”). This Court should therefore vacate the punitive damages award and order a new trial on punitive damages.

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

Despite the absence of evidence warranting any punitive damages against Manor Care, Inc., Plaintiffs made Manor Care, Inc.’s wealth the centerpiece of their punitive damages case, to devastating effect. Because the draconian amount of punitive damages awarded was driven by

⁹ The trial court found that Defendants withdrew their request to have punitive damages liability separately determined for each Defendant. (J.A. 000027.) That is incorrect. After a colloquy in which the trial court *rejected* Defendants’ proposal, Defendants stated that “[i]f the Court’s inclined not to” separately list each Defendant’s liability for punitive damages and list one line for the amount of punitive damages, “then we want all of the defendants together with one line *and the objection is on the record.*” (*Id.* 005612.) (Emphasis added).

evidence of the wealth of a Defendant that should not, on the evidence, have been subject to any punitive damages at all, and all Defendants were obviously and materially prejudiced by that error, the punitive damages award must be vacated and a new trial ordered to determine an appropriate award against the remaining Defendants.

The “financial position of the defendant is relevant” in determining the *amount* of punitive damages only when the defendant’s conduct justifies punitive damages. *See, e.g.*, Syl. Pt. 3, *Garnes v. Fleming Landfill*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Here, the trial court erred in admitting evidence of Manor Care, Inc.’s wealth because there is no evidence that Manor Care, Inc.’s conduct justified any punitive damages at all.

The trial court recognized the weakness of Plaintiffs’ case against Manor Care, Inc. When ruling on Manor Care, Inc.’s motion for a directed verdict, the court found “barely enough” evidence even to let Plaintiffs’ basic negligence and fiduciary duty claims against Manor Care, Inc. go to the jury. (J.A. 005149.) Punitive damages require a substantially greater showing. They are permissible only when the defendant’s conduct meets the *heightened* standard of “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others.” Syl. Pt. 4, *Mayer*, 40 W. Va. 246, 22 S.E. 58; W. Va. Code § 16-5C-15(c). The evidence of Manor Care, Inc.’s conduct was not remotely sufficient to satisfy that standard.

The trial court upheld the jury’s punitive damages award against Manor Care, Inc.—and allowed the jury to consider Manor Care, Inc.’s wealth when deciding the amount of punitive damages against Defendants collectively—based on its finding that “all four Defendants operated the nursing home jointly.” (J.A. 000038.) But the record does not support that finding. The only evidence Plaintiffs presented of Manor Care, Inc.’s *own* actions was the minutes of two

board meetings where the board of Manor Care, Inc. approved the “annual budget” for 2010 and 2011. (J.A. 006746-006751.) That evidence does not provide any linkage between Manor Care, Inc. and Ms. Douglas’ injuries—much less satisfy the heightened *Mayer* standard for the sort of egregious conduct warranting punitive damages—for two reasons. First, Ms. Douglas resided at Heartland nursing home in Charleston in 2009, not during 2010 and 2011. Second, the Manor Care, Inc. board’s approval of consolidated nationwide budgets presented to it does not indicate that the board took any affirmative action to *constrain* the budgets of its operating subsidiaries (including that of Heartland nursing home in Charleston) to the approved levels. Plaintiffs adduced no evidence whatsoever that Manor Care, Inc. imposed a restrictive budget on its indirect subsidiary for the period in which Ms. Douglas resided at the nursing home.

To the extent the trial court was instead relying on a theory of vicarious liability, that path is blocked both by controlling precedent and explicit waiver. *See supra* at Part II.A. Plaintiffs disavowed any veil-piercing theory and did not meet the stringent standard in any event.

Because the evidence about Manor Care, Inc.’s own conduct does not remotely demonstrate the level of egregiousness that would warrant liability for punitive damages, the trial court erred in allowing Plaintiffs to introduce evidence of Manor Care, Inc.’s wealth for the purpose of determining the amount of punitive damages to be awarded against Defendants collectively. That error requires vacatur of the punitive damages award because it was far from harmless. *See W. Va. R. Evid. 103(a)* (erroneous admission of evidence must affect a “substantial right of the party”); *Reed v. Wimmer*, 195 W. Va. 199, 209 n.13, 465 S.E.2d 199 (1995) (error is harmless only if “can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and that the judgment was not substantially swayed by the error”).

The prejudice that Defendants suffered from the jury's consideration of Manor Care, Inc.'s wealth is palpable. The trial court admitted Manor Care, Inc.'s tax return solely for the jury's use in assessing punitive damages, (J.A. 000025), and Plaintiffs' trial strategy focused relentlessly on using that evidence to extract an enormous punitive damages award. Every time Plaintiffs' counsel mentioned punitive damages during closing argument, he mentioned Manor Care, Inc.'s purported wealth. Plaintiffs' counsel repeatedly emphasized that Manor Care, Inc. was a multi-billion dollar corporation and told the jury that the only way to send a message to Defendants and prevent future injuries like Ms. Douglas's was to award massive punitive damages. Counsel stated: "How are you going to get the Board of Directors attention? For a \$4 billion dollar revenue for one year. That is your sole discretion. What will get their attention, so there will be no more Ms. Douglas's ever again." (J.A. 005715.) Counsel insisted: "[P]unitive damages should remove the profit," and "[t]here's a lot of money to be made in healthcare. Manor Care, Incorporated, for one year, in 2009, earned \$4 billion dollars, one year" and they had "\$7.9 billion dollars in assets." (J.A. 005714.) *See also* (J.A. 005694.) ("[A]t the end of the day, what you've learned is it is solely for profit. When corporations conduct themselves that way, that's when punitive damages are in play, and that's when juries like yourselves get involved."). And in summation counsel returned again to Manor Care, Inc.'s wealth—"four billion dollars in revenue in one year, and seven million [sic] in assets"—and concluded "we have no doubt you'll make the right decision." (J.A. 005721.)

Moreover, Plaintiffs misstated the Defendants' true financial condition. The net income for Heartland nursing home in Charleston in 2009 was \$150,175. (J.A. 001906-001913.) The total equity for Heartland nursing home in Charleston in 2009 was \$3,361,775. (*Id.*) The profit for all of the Defendants' facilities in West Virginia combined in 2009 was \$1,967,730, and the

total equity was \$20,327,330. (*Id.*) Consequently, the punitive damages award is approximately 534 times the profits made at Heartland nursing home for the entire year Ms. Douglas was a resident, and nearly 24 times the total equity of Heartland nursing home in 2009. Moreover, the punitive damages award is 41 times the profits realized by the Defendants in the entire state of West Virginia for the year in question, and nearly 4 times the amount of equity for the West Virginia facilities combined.

Even as to Manor Care, Inc., Plaintiffs' counsel confused the jury by misconstruing entries on the 2009 tax return. After telling the jury that "punitive damages should remove the profit," counsel stated that Manor Care, Inc., "earned \$4 billion dollars" in "one year." (*Id.* 005714.) That was misleading because Manor Care, Inc.'s 2009 tax return showed \$4 billion of "gross profit" (or total gross revenues not deducting expenses), but the *net* profit (after deducting expenses) was only \$75 million nationwide. (*Id.* 007021-007360.) Likewise, the statement that Manor Care, Inc. had \$8 billion in assets was misleading because it omits the \$6.7 billion in liabilities. (*Id.*) Therefore, Manor Care, Inc. has a net worth of approximately \$1.2 billion, which it has accumulated since its inception in 1991, not in one year.

The jury responded just as Plaintiffs' counsel intended. Urged repeatedly that a massive punitive damages award was necessary to teach a lesson to a nationwide, multi-billion dollar company, the jury imposed \$80 million in punitive damages, which amounts to 1% of the amount inaccurately presented as Manor Care, Inc.'s net worth. The sheer amount of that award for an unintentional tort testifies to the success of Plaintiffs' strategy. Because evidence of the wealth of Manor Care, Inc.—against which no punitive damages were warranted—vastly inflated the amount of punitive damages awarded against the remaining Defendants, this Court should vacate the punitive damages award and order a new trial on punitive damages.

VI. At a minimum, the Court should remit the punitive damage award because, on this record, \$80 million is unconstitutionally excessive.

Under both the West Virginia and United States Constitutions, due process constrains the amount of punitive damages awards. As this Court explained in *Garnes*, “[d]ue process demands not only that penalties be abstractly fair, but also that a person not be penalized without reasonable warning of the consequences of his act.” 186 W. Va. at 668. Accordingly, this Court has imposed “(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review.” *Id.* at 667.

The trial court’s approach to its *Garnes* review was fundamentally flawed because, among other things, the court relied on a completely improper consideration: Defendants’ insurance coverage. The court acknowledged that the existence of insurance “weigh[ed] heavily” in its determination that the \$80 million punitive damages award was appropriate, (J.A. 000034), and it concluded that “public policy is best served by imposing the punitive damage award intact because of the presence of punitive damage insurance,” (J.A. 000053, 000047.) That reasoning conflicts directly with this Court’s repeated holdings that punitive damages insurance is perfectly permissible and not contrary to public policy. *See Hensley v. Erie Ins. Co.*, 168 W. Va. 172, 183, 283 S.E.2d 227 (1981) (“refus[ing] to find that [West Virginia’s] public policy precludes insurance coverage for punitive damages arising from gross, reckless or wanton negligence”); *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87, 93, 511 S.E.2d 498 (1998); *Camden-Clark Memorial Hosp. Ass’n v. St. Paul Fire and Marine Ins. Co.*, 224 W. Va. 228, 682 S.E.2d 566 (2009); *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 609 S.E.2d 895 (2004). The trial court’s reliance on this flawed and inappropriate rationale was improper.

In any event, this Court undertakes a *de novo* review of the constitutionality of a punitive damages award. See Syl. Pt. 5, *Alkire v. First National Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996). While the due process analysis is holistic, two of the predominant factors—the ratio of punitive damages to compensatory damages and the comparison of punitive damages to sanctioned civil penalties—establish that the \$80 million punitive damages award is unconstitutionally excessive.

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

Under both West Virginia and federal law, the amount of punitive damages must bear a “reasonable relationship” to compensatory damages. See, e.g., Syl. Pt. 13, 15, *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2002). In *TXO*, this Court outlined “general guidelines” 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.” Syl. Pt. 15, *TXO*, 187 W. Va. 457; see also *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997) (reducing punitive damages award from a 7:1 to 5:1 ratio of punitive to compensatory damages). And critically here, this Court has observed that an even lower ratio applies when compensatory damages are “very high.” *Id.* at 476 n.12. See also *Perrine*, 225 W. Va. at 556-57.

Federal law imposes even tighter ratios. In *State Farm*, the Supreme Court of the United States noted that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” 538 U.S. at 425 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581

(1996). And, again critically for this case, the Court has indicated that when compensatory damages are “substantial” a lower 1-to-1 ratio may be the maximum allowed. *See State Farm*, 538 U.S. at 425 (“When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 n.28 (2008) (in case of substantial compensatory damages, “the constitutional outer limit may well be 1:1”). Federal courts have enforced such a 1:1 ratio limit where compensatory damages are substantial. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (\$600,000); *Jones v. United Parcel Service, Inc.*, 674 F.3d 1187 (10th Cir. 2012) (\$630,307); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007) (\$400,000); *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470 (6th Cir. 2008) (\$366,939); *Mendez-Matos v. Municipality of Guynabo*, 557 F.3d 36, 54 (1st Cir. 2009) (\$35,000 was substantial where that amount “amply compensate[d]” the victim).

For constitutional ratio purposes, the compensatory award in this case is \$500,000 (adjusted for inflation) because the legislature established that cap under the MPLA as the “maximum amount recoverable as compensatory damages for noneconomic loss” in “any professional liability action brought against a health care provider,” W. Va. Code §55-7B-8(a), after carefully considering “the need to fairly compensate patients,” *id.* §55-7B-1. Using the capped amount as the constitutional ratio benchmark is also required because the constitutional limits on punitive damages are grounded in the due process “dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 574. Other courts have analyzed the constitutionality of the ratio of compensatory to punitive damages after applying the relevant statutory cap. *See Kimbrough v. Loma Linda Development, Inc.*, 183 F.3d 782, 785 (8th Cir.

1999); *ConAgra Poultry Co.*, 378 F.3d at 799; *Forsberg v. Pefanis*, 2009 WL 4798124, at *12 (N.D. Ga. July 1, 2011).

At \$80 million-to-\$500,000—or *160-to-one*—the \$80 million punitive damages award here is grossly disproportionate to the compensatory damages. Because the statutorily capped amount is nonetheless substantial, *see supra* at XX, and Plaintiffs have argued only that Defendants’ conduct was reckless,¹⁰ this Court should *at most* allow a 1-to-1 ratio and remit punitive damages to \$500,000 (plus inflation).

B. The amount of punitive damages is grossly disproportionate to civil penalties for comparable conduct.

The U.S. Supreme Court instructed in *Gore* that courts should “compare[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct” when assessing the reasonableness of a punitive damages award. 517 U.S. at 583. This Court has recognized that this *Gore* guidepost is not covered by the *Garnes* analysis and must be addressed separately. *See Perrine*, 225 W. Va. at 562, 694 S.E.2d at 895. Analyzed that way, even a \$500,000 (adjusted for inflation) punitive damages award would be excessive in this case, as the highest civil penalties sanctioned for similar conduct are much lower.

The disparity here between comparable civil penalties and the \$80 million punitive damages award is enormous. Under West Virginia law, a nursing home may be fined pursuant to W. Va. Code R. §64-13-16, for violating the West Virginia regulation that governs the appropriate staffing level in a nursing home, *id.* §64-13-8.14(a). But the maximum amount of such a civil money penalty is \$8,000. *Id.* §64-13-16.9.a. Under federal law, a facility that receives Medicare or Medicaid support also may be fined. But the fine is a maximum of \$10,000 per day for deficiencies that put residents’ health in “immediate jeopardy,” 42 C.F.R.

¹⁰ The trial court here did not find that any Defendant intended to cause Ms. Douglas harm, (J.A. 000043-000045), and Plaintiffs argued to the jury only that Defendants’ conduct was “reckless,” (*id.* 005713).

§488.438(a)(1)(i), or for violating the federal regulation that governs the appropriate staffing level in a nursing home, 42 C.F.R. §483.30; *see also* 42 C.F.R. 488.406 (civil penalties are a remedy). Even using the higher amount for federal penalties, the maximum total penalty for Ms. Douglas's two-and-a-half week stay would be \$190,000.

The \$80 million the jury awarded in punitive damages is, accordingly, over *400 times* the comparable civil penalties. Because it is so vastly disproportionate to the legislatures' views of the punishment that is reasonably warranted for the conduct at issue, the \$80 million in punitive damages must be substantially reduced in order to withstand constitutional scrutiny. The benchmark of comparable civil penalties is even lower than the \$500,000 amount that might be justified by use of a 1:1 ratio between punitive and compensatory damages and argues strongly against an award of any higher amount.

CONCLUSION

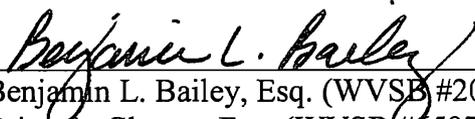
For these reasons, this Court should:

1. Vacate and remand for new trial consistent with this Court's opinions on the legal issues presented herein; or
2. In the alternative, if this Court declines to vacate the entire judgment, then reduce the compensatory damages to the MPLA cap of \$500,000 (adjusted for inflation) and either vacate the \$80 Million punitive damages award, or grant a new trial on the liability of each defendant for punitive damages and on the amount of such punitive damages, or at a minimum, substantially reduce the \$80 Million award pursuant to *Garnes* and federal due process principles.

Respectfully submitted,

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

By Counsel



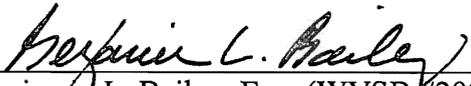
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of August, 2013, the foregoing **Petitioners' 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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