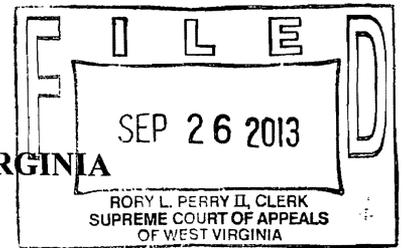


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 13-0470



**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 / DEFENDANTS

v.

Case No. 13-0470
On Appeal from Kanawha County
Circuit Court Cause No. 10-C-952

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

RESPONDENT / PLAINTIFF

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SUMMARY OF ARGUMENT

Upon her admission to Heartland of Charleston on September 4, 2009, Dorothy Douglas could walk with the use of a walker and could recognize and communicate with her family. JA004536-4537. Ms. Douglas could feed herself with limited assistance and was well-nourished and well-hydrated. JA004538-4539. Her treating physician believed that with proper care, Dorothy Douglas would live for several more years. JA004406, 4408. Unfortunately, as a direct result of the budgetary decisions of the Corporate Defendants, the Petitioners (hereinafter “Defendants” or “Corporate Defendants”), Dorothy Douglas did not receive proper care. After three weeks at Heartland of Charleston, Ms. Douglas was dehydrated, malnourished, bed ridden and barely responsive. JA004308; JA004320. She had fallen numerous times, suffered head trauma, and was covered in bruises. JA004369; JA004459; JA4451-4452; JA004558. Sores had formed in her mouth and throat from which dead tissue and debris had to be scraped away. JA004301-4305; JA004309; JA004372. After a few days in the hospital, and despite the efforts made there, Ms. Douglas died from severe dehydration because she had not been given enough water. JA004647; JA004653.

In order for this Court to understand how the jury reached its result, one has to understand the family of companies known as HCR ManorCare and how they operate. The evidence adduced at trial was that the control for this family rested with one entity, Manor Care, Inc. JA004667; JA004675. There was an absence of evidence that the licensed operator of Heartland of Charleston, Health Care and Retirement Corporation of America, LLC, performed any function other than holding the license. While Heartland Employment Services, LLC “employed” the workers (JA006806-6812) and HCR Manor Care Services, Inc. was the “management company” (JA006752-6761), the *control* of the operations vested with Manor Care, Inc. JA004428; JA004667-4668. This type of corporate structure demonstrates not only

the close relationship between the Defendants but also the independent role they each played in the operations of Heartland of Charleston.²

The Defendants are in the business of taking care of those who are no longer capable of taking care of themselves, the most weak and vulnerable sector of our population, the elderly, whose most basic needs must be met by individuals upon whom they are wholly dependent. As a result, the quality and quantity of staff provided very often means the difference between life and death. Defendants knew that this facility was lacking in both well before Ms. Douglas became a resident at their facility. They were repeatedly told that there was inadequate staff to meet the needs of the residents by their own employees, including management level employees, by the residents and their family members, and by State Investigators. JA004186; JA004264; JA004471. Defendants knew that these conditions resulted in a turnover rate of over 100 percent for the year Ms Douglas was a resident. JA004475. The conditions were so bad they would actually lose employees before the end of their orientation. JA004481. Even Defendants' own policies acknowledged that short staffing and employee turnover will result in neglect and abuse of nursing home residents. JA007013-7014. Sadly, they were indifferent to these consequences, and residents like Dorothy Douglas suffered. Ms. Douglas' demise was the foreseeable consequence of corporate owners focused more on profit than the welfare of the residents they are paid to protect.

Ms. Douglas' son filed suit against Defendants for the wrongful death of his mother, alleging various claims, including claims for violations of the Nursing Home Act (NHA), Breach of Fiduciary Duty, Corporate Negligence, and Medical Malpractice. Defendants made strategic decisions at trial that, at the time they were made, seemed to have been the appropriate strategy.

² This relationship between the Defendants is also demonstrated in the actions of their counsel wherein, as discussed below, they requested one damage line for punitive damages with no ability to apportion post trial.

A prime example is Defendants' Counsel explaining to the Court why the Defendants wanted to be lumped together for punitive damages on the verdict form: "I don't want to have three or four separate lines for the jury to write in a number three or four times." JA005615. While there is clearly a logical basis for his position, it certainly forecloses an analysis of the punitive award to each defendant as they cannot now be separated. Further, this approach meant that Respondent (hereinafter "Plaintiff"), had no opportunity to address many of the issues about which Defendants now complain. The trial court could not rule on these issues at trial, and this Court should not consider them now.

Following a ten (10) day trial, a jury returned a verdict in favor of the Plaintiff awarding \$11.5 million in compensatory damages and \$80 million in punitive damages arising out of the wrongful death of Dorothy Douglas. On October 20, 2011, the Circuit Court of Kanawha County, the Honorable Paul Zakaib, Jr., presiding, entered a Judgment Order recording the jury verdict. The Manor Care Defendants filed post-trial motion(s) setting forth some thirty-six (36) professed errors which the Court addressed in its post-trial Order affirming the compensatory verdict on April 10, 2013. The Court affirmed the punitive damage verdict in a *Garnes* Order entered on the same day.

The Manor Care Defendants have professed error in the orders affirming the compensatory verdict and punitive verdict. The professed errors are organized in six (6) broad categories:

- (1) The Manor Care Defendants profess error in the verdict form;
- (2) The Manor Care Defendants profess error in the post-trial application of the MPLA to the compensatory verdict;
- (3) The Manor Care Defendants profess error in the style of the case;
- (4) The Manor Care Defendants profess error in the viability of a breach of fiduciary duty claim;
- (5) The Manor Care Defendants challenge the sufficiency of evidence to support a punitive damage award and demand a remittitur

- (6) The Manor Care Defendants assert the punitive damage award is constitutionally excessive.

As set forth herein, none of Defendants' points have merit and this Court must affirm.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiff requests Rule 20 argument in light of the length of the trial, volume of the evidence, and subtle nuances and distinctions that must be made in response to the arguments set forth by Defendants.

STANDARD OF REVIEW

While Defendants set forth a standard of review, they fail to mention that this Court has stated that in reviewing a Motion for Judgment Notwithstanding the Verdict, "the evidence must be viewed in the light most favorable to the nonmoving party." *Mountain State College v. Holsinger*, 230 W.Va. 678, 742 S.E.2d 94 (2013). In review of a denial of a motion for a new trial, this Court has stated:

[T]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, and the trial court's ruling will be reversed on appeal only when it is clear that the trial court has acted under some misapprehension of the law or the evidence. . . . We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard . . . the circuit court's underlying factual findings under a clearly erroneous standard and questions of law under a de novo standard.

Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc., 223 W.Va. 209, 672 S.E.2d 345 (W.Va. 2008).

Further, this Court gives great deference to a jury's determinations:

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Community Antenna Service, Inc. v. Charter Communications VI, LLC, 227 W.Va. 595, 712 S.E.2d 504 (W.Va. 2011).

Finally, as has been stated by this Court, the Defendants are entitled to a “fair trial”; not a “perfect trial” because “such a thing does not exist.” *Sprouse v. Clay Communication, Inc.*, 158 W.Va. 427, 464 211 S.E.2d 674, 698 (W.Va. 1975). When considered under the appropriate standard and giving the evidence presented in this case its highest probative force, the verdict in this matter must be affirmed.

ARGUMENT

While Defendants object strenuously to numerous alleged errors at trial, they failed to preserve the majority of these alleged errors, and are thus foreclosed from raising them on appeal as set out below. It is axiomatic that “a litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal.”

Radec, Inc. v. Mountaineer Coal Dev. Co., 210 W. Va. 1, 4, 552 S.E.2d 377, 380 (2000) (quoting Syl. Pt. 1, *Maples v. West Virginia Department of Commerce*, 197 W.Va. 318, 475 S.E.2d 410 (1996)). Here, not only did Defendants fail to preserve these alleged errors, many of the alleged errors are actually a result of Defendants’ strategic trial decisions. Even assuming *arguendo* that the doctrine of waiver does not bar Petitioner’s claims of error, their arguments are without merit and the judgment of the trial court should be affirmed.

I. THE JURY VERDICT FORM WAS NOT FATALLY FLAWED AND DID NOT DEPRIVE DEFENDANTS OF A FAIR DECISION, DOES NOT CONSTITUTE PLAIN ERROR, AND DOES NOT MANDATE A NEW TRIAL.

A. The trial court did not abuse its discretion in submitting the verdict form, as Defendants did not request a separate determination of fault and damages.

Defendants assert that the verdict form improperly lumped all of the Defendants together, thereby denying each defendant its right to a separate determination of liability for both

compensatory and punitive damages. Based on the record, the trial court specifically found that Defendants did not request an instruction, nor did they object to the verdict form selected by the Court on the basis that it did not allow for a separate determination of liability and allocation of fault as it related to compensatory damages.³ JA000019. While Defendants requested a separate determination of *liability* for each Defendant as it related to punitive damages, they wanted only one line for the *amount* of punitive damages awarded against all. The trial court explained that if Defendants wanted a separate determination of punitive liability, there had to be a corresponding separate determination of the amount of punitive damages.⁴ JA005611. Counsel for Defendants' strategy was clear when he stated that he did not "want to have three or four separate lines for the jury to write in a number three or four times" and withdrew his request for a separate determination of liability. JA005614-5615.

The trial court determined that the Defendants failed to properly invoke comparative contribution by failing to request "special interrogatories pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure be given to the jury" as set forth by this Court in *Howell v. Luckey*, 205 W.Va. 445, 518 S.E.2d 873 (1999). JA000020 (citing *Howell*, at Syl. Pt. 4). As further support for the waiver of this argument, the jury instructions proffered by Defendants did

³ The trial court noted that this Court's Memorandum Decision No. 12-0443 allowed the Defendants to add their proposed verdict form to the record. JA000019. However, the trial court found nothing in the record to support the argument that Defendants at any point made a request, asked for an instruction, or raised an objection on the basis that there would not be an individual determination of liability and an allocation of fault as it relates to compensatory damages. *Id.* Even the verdict form that Defendants later submitted does not allow the jury to allocate the "percentage of fault" amongst the Defendants. JA001418-1424. This decision was made because Defendants each had "separate corporate forms, roles, and responsibilities" (Defendants' Brief at 20) in this joint venture - ManorCare, Inc. controlled the purse strings (JA004444; JA004667; JA006746-6751, HCR Manor Care Services, Inc. was the management company for the facility (JA006752-6761), Heartland Employment Services, LLC provided the employees pursuant to the Employee Leasing Agreement (JA006806-6812), and Health Care and Retirement Corporation of America, LLC was the shell licensee for the facility. JA007015. Defendants are all so interrelated that their only concern was to limit the exposure, not who would get stuck with the bill.

⁴ During this discussion, the trial court posed the question to Defendants' Counsel as to who was going to separate the punitive damages among the numerous Defendants with only one line. JA005614. Without responding to the court's inquiry, Counsel for Defendants chose to inform the trial court that they had "taken care of it" and were not going to have separate lines, thereby conceding the issue. *Id.*

not instruct the jury that it could determine liability and allocate damages as to each defendant separately.⁵ JA001335-1348. Therefore, the trial court properly found that Defendants did not preserve the issue of determination of liability and allocation of fault as it related to compensatory or punitive damages and any argument Defendants attempt to now make with regard to allocation of fault is waived. JA000019.

B. The verdict form did not enable the jury to award duplicative damages.

Defendants argue that the verdict form caused the jury to award duplicative damages, but the trial court properly found that they did not properly preserve this issue by failing to request a jury instruction on duplicative damages. JA 00021.⁶ Defendants' assertion that they preserved this issue is misplaced. *See* Defendants' brief at fn3. To properly preserve this issue, it was incumbent on the Defendants to object to or propose a jury instruction that would address the issue of duplicative damages, neither of which occurred. Courts in other jurisdictions have held that defendants should not be allowed to complain that a jury instruction regarding duplicative damages should have been given, or that the jury should have been polled to determine intent, when the defendants failed to propose such an instruction despite numerous opportunities to do so. *Barkley v. United Homes, LLC*, 848 F. Supp. 2d 248, 260 (E.D.N.Y. 2012) ("Defendants, however, should not now be heard to complain that a jury instruction regarding duplicative damages should have been given, or that the jury should have been polled to determine intent, when defendants failed to propose such an instruction despite numerous opportunities to do so before and during the three-week trial, and failed to request that the jury be polled to clarify what defendants now claim is a duplicative damages award."); *Meron Tech. Distribution Corp. v.*

⁵ The only jury instruction in this matter that is even remotely related to this request was Defendants' Jury Instruction No. 12 (JA001346), and this instruction was voluntarily withdrawn by Defendants. *See* JA005599.

⁶ The only time Defendants mention the issue of duplicative damages was during the argument on the viability of the fiduciary duty claim when reviewing the verdict form. JA 005625

Discreet Indus. Corp., 189 F. App'x 3, 4 (2d Cir. 2006) (“As to whether the jury awarded duplicative damages, defendants have waived any argument regarding the jury instruction or verdict sheet given their failure to raise this issue in their requests to charge or at the charging conference, or to lodge a timely objection, or to request that the court poll the jury.”); *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48, 54-55 (2d Cir. 1992) (Failure to object to jury instruction or form of interrogatory prior to jury's retiring results in waiver of objection); *Jenkins v. Ellis*, 2008 Mass. App. Div. 109 (Dist. Ct. 2008) (“[Defendant] waived, for purposes of appellate review, any objection to jury instructions as to the damages recoverable on each claim, both of which included damages for injury to reputation, where [defendant] did not object to the instructions as given or request an instruction on duplication of damages.”).

A review of the charge conference related to the fiduciary claim instruction supports the trial court’s finding that this issue was not raised by Defendants. JA005548 – 5551. Defendants’ proposed jury instructions likewise remain silent as to the issue of duplicative damages. JA001335-1348. Defendants now complain about the error they created. *Young v. Young*, 194 W. Va. 405, 409, 460 S.E.2d 651, 655 (1995)(“We have long held that judgment will not be reversed for an error introduced into the record or invited by the party seeking reversal. The party who caused the irregularity or committed the error should not be advantaged on appeal by that same irregularity or error.”).

This Court reviews a trial court’s decision regarding a verdict form under an “abuse of discretion standard.” *Perrine v. E.I. DuPont de Nemours*, 225 W. Va. 482, 694 S.E.2d 815, Syl. Pt. 4 (2010). “[T]he criterion for determining whether the discretion is abused is whether the verdict form, together with any instruction relating to it, allows the jury to render a verdict on the issues framed consistent with the law, with the evidence, and with the jury's own convictions.” *Williams v. Charleston Area Medical Center, Inc.*, 215 W.Va. 15, 19, 592 S.E.2d 794,

798 (2003). As noted, *infra*, the Defendants did not preserve, nor do they assert error in post-trial motions or in their brief before this Court, that the jury was improperly instructed on West Virginia damage law. “If the jury was properly instructed, then there was no abuse of discretion on the part of the trial court in not duplicating the instructions on the verdict form.” *Perrine*, 225 W. Va. at 539. The trial court properly used the special verdict provisions found in Rule 49 of the West Virginia Rules of Civil Procedure. Rule 49 “provides a proper vehicle to determine complex issues and requires that where the special verdicts or interrogatories are utilized, they may form a basis for altering a general verdict.” *Harless v. First Nat. Bank in Fairmont*, 169 W. Va. 673, 682, 289 S.E.2d 692, 698 (1982).

Even if it was not waived, however, as the trial court found, “this case is not a single incident case like a botched surgery or an auto accident; it is a course of events that occurred over an extended period of time, nineteen days.” JA000022. There was proof of multiple failures and multiple injuries over this extended period of time, and neither the trial court nor this Court can determine which alleged breaches and damages were awarded for which claim. Indeed, other than the jurors themselves, no one knows under which theory of liability the jury found negligence and awarded damages to Dorothy Douglas’ Estate related to the unexplained bruising and wounds, the fall and head trauma, the dehydration she suffered, the necrotic sores in her mouth, the loss of her ability to walk, violations of her dignity, or for something else they heard in the evidence related to these and many more issues presented during this ten (10) day trial. This is similar to the case of *Barkley, supra*, in which the Court stated that “although an instruction explicitly addressing duplicative damages was not read to the jury, the charges clearly instructed the jury on the measure of damages to be assessed as to the [claims] . . . [and] [e]ven now, defendants cannot establish that the damages awarded were duplicative rather than allocated among the multiple injuries presented by plaintiffs at trial.” *Barkley*, 848 F. Supp. at

260.

The verdict form contained multiple questions related to survival damages for the jury: the NHA claim (questions 1 and 2) and fiduciary duty claims (questions 6 and 7).⁷ Based on the evidence presented at trial and the trial court properly instructing the jury, the jury awarded survival damages for both the NHA and fiduciary claim. The jury award itself does not support the Defendants' argument as they awarded \$1.5 million for the NHA claim and \$5 million for the fiduciary claim. If the jury was so confused as to "duplicate" damages, it would have inserted the same figure twice. It is far more reasonable to assume the jury would have entered a survival damage award of \$6.5 million if provided a single opportunity on the verdict form.⁸

C. The verdict form did not constitute error by allowing the jury to award damages to non-parties.

Defendants assert that the verdict form improperly allowed the jury to award damages to non-parties, Tom Douglas individually and Carolyn A. Douglas Hoy, the children and wrongful death beneficiaries of Dorothy Douglas. This issue was discussed in the charge conference only with respect to the jury instructions and Plaintiff agreed to change the instruction to state that the damages were being "awarded to the estate for the loss of consortium of Tom and Carolyn." JA005559-5560. This change was made and the instruction was given as indicated. JA005682. As to the verdict form, this issue was not raised by the Defendants at trial as neither party realized that the verdict form had not been changed to add the language: "to the Estate." Instead, Defendants only asked that Tom and Carolyn be listed on a single line on the verdict form. JA005622; JA005625. Notably, the following day, Counsel for Defendants addressed this section of the verdict form and asked that Tom and Carolyn be separated out again, thereby

⁷ These survival damages are the only damages that Defendants assert are duplicative. *See* Defendants' Brief at 11.

⁸ Even if this Court were to determine the survival damages are duplicative, then it should, at most, reconcile the damages by eliminating only the redundancy. Doing so, the larger should effectively "swallow" the smaller and a general award of survival damages should stand at \$5 million, aggregate, for both theories of liability.

changing position from what they argued the day prior. JA005652-5654. At no other point did Defendants raise any other issue with this section of the verdict form.

Additionally, Defendants' assertion that awarding the wrongful death proceeds directly to the wrongful death beneficiaries was "legally wrong" is simply incorrect and inconsistent with the law of this State. *See* Defendants' brief at 13. While the personal representative of the deceased in a wrongful death action has to bring suit, they do so as a "nominal party and any recovery passes to the beneficiaries designated in the wrongful death statute and not to the decedent's estate." *Ellis v. Swisher ex rel. Swisher*, 230 W. Va. 646, 741 S.E.2d 871, 875 (2013) (quoting *McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (1991))⁹ Therefore, Defendants' assertion that the proceeds had to be awarded to the "estate" is incorrect and Defendants' alleged error is without merit.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE MEDICAL PROFESSIONAL LIABILITY ACT WAS NOT THE EXCLUSIVE REMEDY FOR PLAINTIFF'S CLAIMS AGAINST DEFENDANTS.

Defendants assert that the West Virginia Medical Professional Liability Act precludes all other claims and caps the compensatory damages awarded. However, causes of action for both ordinary negligence and medical malpractice can be asserted by a plaintiff, and the caps *only* apply to the portion of the compensatory verdict determined by the jury to arise out of health care services provided by a health care provider to a resident. Plaintiff pled in his initial Complaint causes of action for medical malpractice and corporate negligence, presented evidence on each theory, and the jury determined what percentage caused harm to Ms. Douglas. JA000180-000227; JA000011-000015. Throughout their brief, Defendants misconstrue Plaintiff's complaint and theory of liability against the Corporate Defendants, yet the record

⁹ *Richardson v. Kennedy*, 197 W. Va 326, 475 S.E. 2d 418 (1996), cited by Defendants on page 12 of their Brief, does not address to whom the proceeds of a wrongful death cases are to be awarded.

plainly reflects that Plaintiff alleged *direct* liability against the Corporate Defendants for the decisions they made that had a *direct* impact on the harm suffered by Dorothy Douglas.

A. All but one of the Defendants admitted they are not health care facilities or health care providers.

As a preliminary matter, the issue of whether certain Defendants fall under the MPLA has been waived. During pretrial discovery, Manor Care, Inc.; HCR Manor Care Services, Inc.; and Heartland Employment Services, LLC admitted that they were not licensed to operate Heartland of Charleston or any “health care facility,” were not a “health care provider” as defined by West Virginia Code § 55-7B-2, and did not provide health care. JA003445-3454. Indeed, only the entity licensed by the State of West Virginia would be considered a “health care facility” pursuant to the MPLA, and the evidence at trial showed that that entity, Health Care and Retirement Corporation of America, LLC, in all reality, had very little control over Heartland of Charleston. Further, at trial, these Defendants were not separated out on the verdict form due to counsel’s strategic decision not to request such an instruction. *See* Plaintiff’s Brief at 5-6. Thus, the trial court properly found that because “the Defendants allowed a ‘health care provider’ to be comingled with the other Defendants that do not qualify under the MPLA as to the determination of compensatory liability and amount of damages, this issue is waived.” JA000017. Defendants’ trial decision makes it impossible to now determine which portion of the verdict, either compensatory or punitive, should be allocated to the one health care provider in the case.

Plaintiff did not proceed against any of these Defendants on the basis of vicarious liability, but on direct liability for each Defendant’s own independent actions. This Court has long held that any corporation/entity can be held responsible for its actions. *Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 316, 40 S.E.2d 332, 340 (1946); *Kanawha Black Band Coal Co. v. Chesapeake & O. Ry. Co.*, 107 W. Va. 469, 148 S.E. 855, 858 (1929). Defendants

concede that Manor Care, Inc., HCR Manor Care Services, Inc., and Heartland Employment Services, LLC do not satisfy the statutory triggers to qualify for application of the MPLA. *See* Defendants' Brief at 14. There was ample evidence presented at trial, and specific findings made by the trial court as to how non-healthcare decisions, such as budgetary constraints, lack of staff, and poor management of the facility, affected the residents and specifically Dorothy Douglas during her residency at Heartland of Charleston. JA000018; JA000023; JA000026; JA000031.

For example, based on the Corporate Services Agreement entered at trial, HCR Manor Care Services, Inc. was providing management services, including but not limited to, regulatory compliance. JA006752. Under the Employee Leasing Agreement, Heartland Employment Services, LLC was to provide staff necessary for Heartland of Charleston to operate in compliance with its policies. JA006806. The Corporate Services and Employee Leasing Agreements state that Manor Care, Inc. and its subsidiaries and affiliates are providers of health care services (JA006752; JA006806) and Manor Care, Inc.'s tax return indicates that it provides nursing care and health care. JA007023. Also, David Parker, the General Manager and Vice-President of the Atlantic Division, who is responsible for the administrative and operational aspects as well as the provisions of healthcare for forty-seven facilities including Heartland of Charleston, testified how Manor Care, Inc. had their skilled nursing component (nursing homes) divided into six regions. JA004425-4426; JA004428. Most importantly, he testified that he reported to Stephen Guillard, the Chief Operating Officer of Manor Care, Inc. and that he believed Mr. Guillard reported to Paul Ormond, the Chief Executive Officer/President of Manor Care, Inc.¹⁰ JA006751.

Defendants used their corporate scheme to manipulate and take advantage of the most

¹⁰ According to Mr. Parker's testimony, Mr. Guillard also had to approve the budget for the facilities within Mr. Parker's division, which included Heartland of Charleston. JA004444.

vulnerable citizens of West Virginia and should not be allowed to contravene the requirements of the MPLA and now claim its protections. Indeed, these Defendants, unlike a hospital or doctor, created a complex corporate scheme of companies providing management and control over Heartland of Charleston. The true essence of what Defendants now complain is the exposure of their corporate scheme. As here, an argument based on such diametrically opposed positions cannot stand.

B. The MPLA and NHA can coexist.

Both the MPLA and the NHA provide for different actions and recovery and can therefore coexist. This becomes clear in a review of the clear and unambiguous language of the statutes at issue which express the legislative intent involved, as well as a brief examination of the history of both acts. “When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” *Davis v. Mound View Health Care, Inc.*, 640 S.E.2d 91, 91 (W.Va. 2006), “[T]he rule against statutory nullity is a cardinal rule of statutory construction . . . that significance and effect must, if possible, be given to every section, clause, work or part of the statute.” *Dunlap v. Friendman’s, Inc.*, 582 S.E.2d 841, 848 (W. Va. 2003).

In the Nursing Home Act, the West Virginia legislature stated that the policy of this State to “encourage, promote and require the maintenance of nursing homes so as to ensure protection of the rights and dignity of those using the services of such facilities.” W. Va. Code § 16-5C-1. Further, “the provisions of this article are hereby declared to be remedial and shall be liberally construed to effectuate its purposes and intents.” *Id.* Although originally drafted in 1967, Section 16-5C-15 was amended in 1997 and is controlling in this case. According to the specific language of the amendment, its purpose, in part, was to “[specify] unlawful acts [and] [provide] for civil and criminal penalties, injunctions and **private rights of action.**” *See* W. Va. Code, §

16-5C-15 (emphasis added). Notably, this amendment was made *after* the creation of the MPLA. If the legislature intended for the MPLA to fully control and incorporate the NHA within its “umbrella,” language to that effect would have been included either during the NHA’s amendment in 1997 or the MPLA’s amendment in 2006.¹¹ However, such language is not found in either statute.

The NHA states in part:

Any nursing home that deprives a resident **of any right or benefit** created or established for the well-being of this resident by the terms of any contract, by any state statute or rule, or by any applicable federal statute or regulation, **shall be liable** to the resident for injuries suffered as a result of such deprivation. **Upon a finding that a resident has been deprived of such a right or benefit, and that the resident has been injured as a result of such deprivation, and unless there is a finding that the nursing home exercised all care reasonably necessary to prevent and limit the deprivation and injury to the resident, compensatory damages shall be assessed in an amount sufficient to compensate the resident for such injury.** In addition, where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, **punitive damages may be assessed.**

W. Va. Code § 16-5C-15(c) (emphasis added).

Importantly, the Nursing Home Act also states:

The penalties and remedies provided in this section are cumulative and **shall be in addition to all other penalties and remedies provided by law.**

W. Va. Code § 16-5C-15(d) (emphasis added).

This Court has recognized the importance of protecting one of its most vulnerable populations. In *State v. Bull*, 204 W. Va. 255, 512 S.E.2d 177 (1998), this Court held that “it cannot be disputed that it is socially desirable for people to take care of incapacitated adults” and that neglect of an incapacitated adult is reprehensible conduct that is subject to criminal

¹¹ While Defendants cite the 2013 amendment to 16-5C-15 as support for the expansion of the MPLA, this amendment specifically states that it is “not in any way intended to modify, change, expand or contract the Medical Professional Liability Act.” W. Va. Code, § 16-5C-15(h). Assuming, *arguendo*, the 2013 amendments might impact the outcome in a future case, they do not effect this matter directly, as they “shall be effective July 1, 2013: *Provided*, That there shall be no inference, either positive or negative, to any legal action pending pursuant to this section as of July 1, 2013.” *Id.*

prosecution and penalty. *Id.* at 263, 512 S.E.2d at 185. In keeping with that policy, in *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) *overruled on other grounds by Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012), this Court recognized the importance and validity of the NHA: “[t]he Act was designed to promote and require that nursing homes be maintained and operated ‘so as to ensure protection of the rights and dignity of those using the services of such facilities.’” *Id.* at 668, 724 S.E.2d 272. Further, this Court recognized that “[t]he Nursing Home Act also creates a civil cause of action for injuries caused to a nursing home resident.” *Id.*

Indeed, the specific language of the Act clearly indicates that its purpose is to protect nursing home residents that are injured as a result of any deprivation of a right or benefit. Although some of these rights or benefits could fall under the MPLA, others do not. Thus, the NHA provides for a separate cause of action that includes certain claims that fall outside of the MPLA. Nothing in the specific language of the MPLA states that it controls to the exclusion of all other statutes that include claims other than for medical malpractice. Under Section 55-7B-2(i), “medical professional liability means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.” Certainly some actions that occur within a nursing home are not “health care” as defined by the statute as “any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement.” W. Va. Code § 55-7B-2(e).

This very issue was discussed by the Illinois Supreme Court in *Eads v. Heritage Enter., Inc.*, 787 N.E.2d 771 (Ill. 2003). There, the Court addressed the issue of whether a plaintiff asserting a private right of action under the Illinois Nursing Home Care Act was required to

comply with the mandates of the Healing Arts Malpractice Act, namely presenting a certificate of merit in support of her claims. In reaching its conclusion, the Court analyzed the opposing nature of the two acts:

The Nursing Home Care Act sought to achieve its purposes by expanding the criminal and civil liability of nursing home owners and licensees and by encouraging nursing home residents to press their claims as private attorneys general. Under the Act, litigation was viewed as an engine of reform. Just the opposite was true of the medical malpractice reform legislation with which section 2-622 was enacted. That set of laws viewed private damage claims as detrimental. Rather than expand opportunities for plaintiffs to seek redress, the medical malpractice reform legislation was designed to protect defendants.

The medical malpractice reform legislation expressly bans recovery of punitive damages in all cases in which the plaintiff seeks damage by reason of medical, hospital or other healing arts malpractice. . . . By contrast, the Nursing Home Care Act allows plaintiffs to recover common law punitive damages upon proof of willful and wanton misconduct on the part of the defendants.

Id. at 777-778 (citations omitted).

The Court went on to state that if it took the Defendants' view, the legislative purpose behind the Nursing Home Care Act would be thwarted:

In reaching this conclusion, we are aware that many types of claims actionable under the Nursing Home Care Act have nothing whatever to do with medical or healing art malpractice. Nursing home residents are entitled to invoke the provisions of the Nursing Home Care Act to obtain damages for violation of any of the rights enumerated in the statute. These include the right to....

Id. at 778-779 (citations omitted)(emphasis added).

In the instant case, as in *Eads*, the NHA was enacted prior to the MPLA. If Defendants' argument is adopted, it would render the NHA a nullity and there would be few cases involving private rights of action against nursing homes, thus preventing nursing home residents and their families from availing themselves of the remedies and protections of the NHA. Again, had the legislature wished to repeal the NHA by the provisions of the MPLA, it could have easily done

so.¹² It did not, and Plaintiff's claims must stand.

C. Ordinary negligence claims can exist in addition to claims for Medical Malpractice

Plaintiff pled separate and distinct causes of action in this matter and at trial presented evidence that Defendants failed to provide sufficient staff or budget for Heartland of Charleston, knew that under staffing the facility would put residents in harm's way and, ultimately, that Ms. Douglas was injured and died as a result of these practices. As set forth herein, these claims cannot be considered "health care" decisions. The testimony of David Parker, the General Manager and Vice-President of the Atlantic Division, showed that the budget for Heartland of Charleston is reviewed by the regional director and the administrator. JA004443-4444. After this review, the budget is presented to Mr. Parker for his review. *Id.* Mr. Parker then presents his operating budget to the Chief Operating Officer of Manor Care, Inc. for approval. JA004445. The facility was then expected to comply with the numbers budgeted by Manor Care, Inc. JA004446.

Devon Revels, the human resources director at Heartland of Charleston, testified that she thought the wages were too low for certified nursing assistants (CNAs), that she brought this to the attention of her supervisor, but that no increase in wages was made. JA004468; JA004470-4472. Turnover for CNAs at Heartland of Charleston was 112.3% in 2009, and the biggest reasons for leaving were short-staffing, being over-worked, and low wages. JA004475; JA004478. While both Ms. Revels and the facility administrator requested an increase in agency employees¹³, their requests were denied by Mark Wilson, the Regional Director of Operations. JA004478-4479. Thus there were not issues with CNAs failing to act appropriately, but there

¹² See 2013 amendment to W. Va. Code § 16-5C-15.

¹³ Agency employees were employees, such as nurses or CNAs, employed by an outside contractor that could be used to fill in at the facility.

was a general failure to have sufficient CNAs at the facility to be able to act appropriately.

Decisions related to under budgeting and short staffing the facility do not arise from the provision of medical treatment or “healthcare” but from corporate operational decisions made by non-health care providers. Thus, the MPLA cannot be applied to these acts. These negligent and reckless corporate acts that led to the death of his mother have been pled by Plaintiff since the filing of his initial complaint. JA000190-193. These claims are supported by the testimony at trial that Ms. Douglas suffered death by dehydration, simply because she was not given enough water because there were not enough aides to ensure water was provided to her. Ms. Douglas fell because she was not supervised, because there were not enough aides to monitor her. It was not a medical decision to fail to provide Ms. Douglas water or supervision; it was the impact of a corporate decision made by Manor Care, Inc. in the budgetary process when it failed to allocate sufficient resources to Heartland of Charleston, by Heartland Employment Services, LLC when it failed to provide sufficient staff to properly care for the residents pursuant to the Employee Lease Agreement (JA006805-6812), and by HCR ManorCare Services, Inc. when it failed to properly manage the facility pursuant to the Corporate Services Agreement. JA006752-6761

The issue of whether ordinary negligence claims can be asserted against a healthcare provider was addressed by this Court in *Riggs v. West Virginia University Hospitals, Inc.*, 221 W.Va. 646, 656 S.E. 2d 91 (W.Va. 2007), in which Justice Davis, in her concurring opinion, discussed whether a suit for an infection contracted at West Virginia University Hospital could have been brought outside the purview of the MPLA. In *Riggs*, the plaintiff filed a medical malpractice action alleging that the defendant hospital failed to control an environmental serratia outbreak which resulted in the plaintiff contracting a near fatal infection during surgery. *Id.* at 92. Only after a jury verdict exceeding the MPLA's non-economic damages cap was rendered did the plaintiff argue that her claims were not governed by the MPLA. *Id.* At 93. This Court

held that the plaintiff was estopped from changing the theory of her case after receiving a verdict from the jury. *Id.* at 99-100.

Justice Davis provided useful analysis regarding this set of facts, stating that the plaintiff's cause of action was not medical malpractice. *Id.* at 110. Citing *Methodist Hospital v. Ray*, 551 N.E.2d 463 (Ind.Ct.App.1990), *aff'd*, 558 N.E.2d 829, Justice Davis stated:

The decision in *Methodist Hospital* is instructive of two things. First, contracting a disease while in a hospital, due to the hospital's failure to maintain a sterile environment, is simply not within the purview of medical malpractice statutes.

Riggs, 656 S.E. 2d 91 at 113 (citing *Methodist Hospital v. Ray*, 551 N.E.2d 463 465-69 (Ind.Ct.App.1990)).

In reaching this conclusion, Justice Davis looked to the specific language of the MPLA:

Pursuant to Code § 55-7B-2(i) (2006) (Supp. 2007), a cause of action for medical professional liability is defined as “any liability for damages resulting from the death or injury of a person for any tort or breach of contract *based on health care services rendered, or which should have been rendered*, by a health care provider or health care facility to a patient.” (Emphasis added). The Legislature has defined health care services to “mean [] any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement.” W. Va.Code § 55-7B-2(e) (2006) (Supp. 2007).

Riggs, 656 S.E. 2d 91 at 111 (citing W. Va.Code § 55-7B-2)(emphasis in original). Applying this language to the facts, Justice Davis noted that at the time the plaintiff was having knee surgery, the hospital “exposed all of its patients, and possibly anyone entering the hospital, to the potential of contracting a serratia bacterial infection.” *Id.* Defendants state that the “critical fact” taking *Riggs* outside the MPLA was that Justice Davis stated the duty breached ran to non-patients. This simply is not true. Justice Davis plainly states that “[t]he duty breached by the hospital was not that of failing to properly treat Ms. Riggs' knee, but instead **the hospital breached a general duty it owed to all patients and non-patients to maintain a safe**

environment.” *Id.* (emphasis added).¹⁴

Numerous other jurisdictions have found that both ordinary negligence and medical malpractice claims can exist in the same lawsuit. *See Padgett v. Baxley and Appling Cty. Hosp. Auth.*, 741 S.E.2d 193 (Ga. Ct. App. 2013) (injuries that occur in a hospital, nursing home or other health care facility may be solely attributable to ordinary or simple negligence); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003) (Court affirmed jury verdict against nursing home involving claims for ordinary negligence, medical malpractice and breach of contract); *Eads v. Heritage Enter., Inc.*, *supra* (many types of claims actionable under the Nursing Home Act have nothing to do with medical or healing art malpractice) *Scampono v. Highland Park Care Center, LLC*, 57 A.3d 582 (Pa. 2012) (a nursing home's failure to ensure the staff's compliance with the plan or the staff's performance of routine non-medical services for residents will generally give rise to claims of ordinary negligence).

D. The jury appropriately apportioned damages between negligence and medical malpractice.

The jury attributed 20% of the \$5 million jury award for wrongful death to “medical negligence.” *See* JA008503. The remaining portion was attributed to “ordinary negligence.”

¹⁴ In *Riggs*, Justice Davis listed several tests from other states. *Riggs*, 656 S.E. 2d 91 at 111. For example, the tests below are consistent with West Virginia’s MPLA and this Court’s prior decisions in *Riggs*, *supra*, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007), *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005); and *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004):

[T]he relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

Trimel v. Lawrence & Mem’l Hosp. Rehab. Ctr., 61 Conn.App. 353, 764 A.2d 203, 207 (2001).

[A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and *667 **112 (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

Bryant v. Oakpointe Villa Nursing Ctr., 471 Mich. 411, 684 N.W.2d 864, 871 (2004); *Riggs*, 656 S.E. 2d at 112.

Thus, the trial court determined that only 20% of the wrongful death damages was subject to the MPLA cap on noneconomic damages and entered a statutory remittitur accordingly. *See* Judgment Order, JA000014.

Defendants have questioned the jury's ability to apportion the negligence in this matter between medical malpractice and ordinary negligence. Repeatedly, they emphasize language of "any liability" and "any tort" from the MPLA, but fail to emphasize the remainder of the sentence which states "based on **health care services** rendered, or which should have been rendered." *See* W. Va. Code § 55-7B-2(i) (emphasis added), and Petitioner's Brief at 20. While Defendants objected to the split at trial, it is clear this was because they simply wanted the entire case to fall under the MPLA. As set forth at length above, this was simply not appropriate. Defendants assert that this Court has never "accepted" such apportionment, but this Court has never examined the issue or decided a case based on facts such as in this matter. Defendants ignore the evidence presented at trial, the fact that multiple Defendants do not qualify for the protections of the MPLA, and Justice Davis' concurring opinion in *Riggs, supra*, which explains how one can have ordinary negligence even when dealing with a healthcare provider under the MPLA.¹⁵ Defendants also completely fail to recognize Plaintiff's corporate negligence claims. *See* First Amended Complaint, JA000264-269. These claims fall squarely outside the realm of the MPLA and, as set forth previously, involve acts or omissions by and on behalf of these Defendants that do not qualify for the protections of the MPLA.

Defendants have failed to establish that the appropriate remedy is to dismiss Plaintiff's non-MPLA claims and apply the damages cap to all of Plaintiff's claims. Defendants took specific actions, in setting up their corporate structure as well as in making corporate decisions

¹⁵ During the charge conference, Defendants' counsel admitted that "nurses provide both healthcare and non-healthcare." JA005528.

that directly affected Ms. Douglas and led to her injuries and death. The factual pattern displayed in this matter does not fall within the MPLA. Defendants' point is without merit and should be denied.

III. THE TRIAL COURT DID NOT ERR BY DENYING THE DEFENDANTS' JUDGMENT AS A MATTER OF LAW ON ALL CLAIMS BY TOM DOUGLAS, INDIVIDUALLY.

Defendants argue that the trial court "never conclude[ed] that Tom Douglas was a proper plaintiff in his individual capacity." Yet, it was not until post-trial motions that the issue was raised.¹⁶ Therefore, the trial court correctly found that the issue was waived. *See* JA000024.

Defendants argue that this is a Rule 12(h)(3) issue involving subject matter jurisdiction and therefore "is always preserved, never waived, and never frivolous." However, the question of whether Tom Douglas is a proper party does not invoke the question of subject matter jurisdiction. While this Court has not directly addressed the issue of whether Rule 12(h)(3) applies to a real party in interest issue, other jurisdictions have. "A challenge to a party's status as real party in interest must be made promptly or the court may conclude the point has been waived." 6A Wright, Miller and Kane, *Federal Practice and Procedure*, § 1554, pp. 406-407 (1990) *See also Gogolin & Stelter v. Karn's Auto Imports, Inc.* 886 F.2d 100, 102 (5th Cir. 1989), *cert. denied* 110 S.Ct. 1480 (defendant waived defense that plaintiff was not real party in interest by failing to timely raise issue); *Hefley v. Jones*, 687 F.2d 1383, 1388 (10th Cir 1982) (real party in interest defense is for defendant's benefit and is waived if not timely raised); *Fox v. McGrath*, 152 F.2d 616, 618-619 (2nd Cir. 1945), *cert. denied*, 66 S.Ct. 966 (since real party in

¹⁶ Defendants direct this Court to a motion to dismiss Tom Douglas in his individual capacity that was filed on August 4, 2011. *See* Defendants' Brief at 23. This motion was indeed filed on Day 9 of the trial, the day all evidence was closed, and near the end of the day, at 4:08 pm. JA001304. However, a thorough review of the transcript indicates that this motion was not mentioned to the trial court at any point prior to the verdict being rendered by the jury. JA005311-JA005787. This is further supported by the fact that the Certificate of Service for this motion indicates not that it was hand-delivered to Plaintiff's Counsel but that it was instead "deposit[ed] in the United States mail, postage prepaid" to Plaintiff's Counsels' office in Mississippi. JA001307. Clearly such service would not have been received before the jury reached its verdict the following day, August 5, 2011.

interest rule is for defendants' protection, it is not jurisdictional and is freely waivable); *Bielski v. Zom*, 627 N.E.2d 880 (Ind. 1994) (if action is brought by other than real party in interest, remedy is not dismissal for lack of subject matter jurisdiction).

Thus the question is not one of jurisdiction but whether Tom Douglas, individually, was a real party in interest. See *Richardson v. Kennedy*, 197 W.Va. 326, 475 S.E.2d 418 (W.Va. 1996). Even if not waived, the appropriate procedure is not dismissal pursuant to Rule 17(a) of the West Virginia Rules of Civil Procedure:

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

W. Va. R. Civ P. 17(a). The trial court ultimately found that since Tom Douglas, as the Administrator of the Estate of Dorothy Douglas, was the appropriate party in this matter, nothing material would have changed and Defendants' assertion of error is without merit. JA000024.

In *Richardson*, a medical malpractice complaint was filed by Joseph Richardson, as administrator of the estate of Richard Walter Richardson, and by Cheryl Richardson, the decedent's widow. Because the estate had been closed, the matter was dismissed by the circuit court for lack of a real party in interest. *Richardson*, 197 W. Va. at 328, 475 S.E.2d at 420. This Court reversed the circuit court's order of dismissal and reinstated the estate's causes of action to permit the decedent's widow, who was also the sole beneficiary of his estate, to qualify as the real party in interest. *Id.* at 333, 425. Once the County Commission named the widow administratrix of the estate, she was substituted for Joseph Richardson as the real party in interest. See *DeVane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (W.Va. 1999) (citing *Richardson, supra*).

Further, W.Va. Code, 55-7-6(b) states that “the jury, or in a case tried without a jury, the court, may award such damages . . . and, may direct in what proportions the damages shall be distributed to the surviving spouse and children.” W.Va. Code § 55-7-6(b) (emphasis added). Thus it was appropriate for Tom Douglas’ damages to be considered individually by the jury in this matter. Under West Virginia law, the relief sought by the Defendants is improper, and this assertion of error is without merit.

IV. THE TRIAL COURT DID NOT ERR BY DENYING JUDGMENT AS A MATTER OF LAW ON PLAINTIFF’S BREACH OF FIDUCIARY DUTY CLAIMS.

Defendants assert that a fiduciary duty does not and cannot exist for the provision of health care services.^{17,18} Additionally, Defendants’ position presumes that all of claims are for the provision of health care services. However, under the law one must look at the relationship to determine whether a fiduciary duty exists.

In *Petre v. Living Centers – East, Inc.*, 935 F.Supp. 808 (E.D. La. 1996), the Federal District Court for the Eastern District of Louisiana squarely addressed whether a nursing home has such a relationship with a nursing home resident such that fiduciary duties arise:

A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:

While this Court concedes that fiduciary relationships are most often found in financial dealings, **the Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the *Schenck* court, “one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities” as those created by a business relationship. *Schenck v. Living Centers-East, Inc., et al*, 917 F.Supp. 432, 437-38 (E.D.La.1996).**

Id. at 812 (emphasis added).

¹⁷ Contrary to Defendants’ assertion that no court “has recognized a fiduciary duty claim for the provision of healthcare services,” some courts when asked have found such a claim. See Defendants’ Brief at 26.

¹⁸ This contention is not supported by West Virginia statutory law, as “malpractice insurance” is defined as insurance arising “...as the result of negligence in rendering expert, *fiduciary* or professional service.” W. Va. Code § 33-1-10(e)(9)(emphasis added).

In *Schenck v. Living Centers – East, supra*, the Court described the relationship between a nursing home and its residents thusly:

Many if not most nursing home residents are in a vulnerable physical and/or mental state. Placing a loved one in such a facility necessarily entails trust on the part of the family as well as the resident. Since the residents reside in the home, the family has comparatively limited access and opportunity to learn if the resident is neglected or otherwise mistreated.

Schenck, 917 F. Supp. 438. See also, *Zaborowski v. Hospitality Care Center of Hermitage, Inc.* (60 Pa. D. & C.4th 474).¹⁹

Courts in neighboring states have examined similar issues. In *John G. v. Northeastern Educational Intermediate Unit 19*, 490 F.Supp.2d 565 (M.D.Pa. 2007), a Federal District Court in Pennsylvania examined a case in which the parents of an autistic student brought various claims against the student’s teacher and others, alleging that the teacher physically and mentally abused the student. The court reasoned that the teacher, as a special education instructor in charge of the student, a child with autism, was in “an overmastering position in the relationship” and that the student trusted and depended on the teacher to exercise sound judgment in handling his care and instruction. *Id.* at 443. See also *Greenfield v. Manor Care, Inc.*, 705 So.2d 926 (Fla.App. 4 Dist. 1997)(overruled on other grounds).

It is difficult to imagine many situations that require more trust than placing oneself in the hands of another to provide the basic necessities of life. The level of trust in such a relationship is even greater where the provider, such as a nursing home, has held itself out as

¹⁹ According to the Restatement (Second) of Torts § 874, a fiduciary who commits a breach of his duty “is guilty of tortious conduct to the person for whom he should act.” *Id.* at cmt. b. The beneficiary is entitled to “tort damages for harm caused by the breach of duty arising from the relation” and, additionally or in substitution for these damages, the beneficiary “may be entitled to restitutionary recovery.” *Id.* This is because not only is the beneficiary “entitled to recover for any harm done to his legally protected interests by the wrongful conduct of the fiduciary, but ordinarily he is entitled to the profits that result to the fiduciary from his breach of duty and to be the beneficiary of a constructive trust in the profits.” *Id.* Further, Courts have held that “[o]ne who assists a fiduciary in committing a violation of his duty is also guilty of a tort.” See *Rowen v. Le Mars Mutual Ins. Co. of Iowa*, 282 N.W.2d 639 (Iowa 1979); *Q.E.R., Inc. v. Hickerson*, 880 F.2d 1178, 1182 (10th Cir. 1989).

having the experience and skills necessary to provide those life sustaining duties. As a fiduciary, Defendants were required to act in the best interest of Ms. Douglas. They did not. The trial court specifically found that despite clear notice and knowledge of problems at the facility, there was no evidence that the Defendants informed Ms. Douglas or her family that the facility was short staffed, had been cited for short staffing, that they were unable to provide the care she needed, or even that her condition was deteriorating, and thereby breached their fiduciary duty. JA000023.

The evidentiary support for the trial court's finding includes, but is not limited to, the following testimony: one of Ms. Douglas' caregivers testified that the facility's staffing was horrible and that she would have more than 15 residents for whom to provide care (JA004174); the facility only had sufficient staff when the State inspectors were in the building for an inspection, indicating that Defendants were aware of the conditions at the facility and attempted to conceal them from the state (JA004180); Ms. Bowles complained of the conditions to her supervisors (JA004185-4186); another of Ms Douglas' caregivers testified that the facility did not have enough staff to meet the needs of the residents (JA004255); human resources director Devon Revels testified that the Defendants were aware of complaints of short staffing (JA004471-4472); Administrator Jeff Smith also testified that he received complaints from residents, family, and staff that there was insufficient staff at the facility and was aware they fell below state minimums for staffing, (JA004777); the State of West Virginia also cited the facility for short staffing (JA006884-6890), and further Defendants took efforts to cover up these staffing and care problems. JA004187. The trial court properly found that Ms. Douglas was a incapacitated resident (JA00041) and that based on the level of trust and confidence placed on and accepted by the Defendants, a fiduciary relationship existed (JA000023).

This Court has held that “[w]here a fiduciary relationship exists and there is an indication

of fraud a presumption of fraud arises and the burden of going forward with the evidence rests upon the fiduciary to establish the honesty of the transaction.” *Napier v. Compton*, 210 W.Va. 594, 596 558 S.E.2d 593, 595 (W.Va. 2001)(citing Syl pt 10, *Work v. Rogerson*, 152 W.Va. 169, 160 S.E.2d 159 (1968)).

Further, this issue has been waived by the Defendants as set forth in section I of this brief. The Defendants have also waived their ability to challenge the sufficiency of the evidence in this regard as they failed to renew their directed verdict at the close of all the evidence. *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S.E. 782 (1893) (Any error in denial of motion for a directed verdict at close of plaintiff's evidence is waived by failure to renew motion after all the evidence is in.) Additionally, only two of the Defendants, Manor Care, Inc. and HCR Manor Care Services, Inc., moved for a directed verdict at the close of Plaintiff's case in chief. JA005146; JA005148-5156.

Based upon the evidence and applicable authority, Plaintiff established that Defendants owed a fiduciary duty to Ms. Douglas and breached that duty. Damages were foreseeable as a result of this breach, and the jury award should be allowed to stand.

V. THE PUNITIVE DAMAGES AWARD SHOULD NOT BE VACATED OR SUBSTANTIALLY REDUCED.

A punitive damages award was clearly justified in this case. Under West Virginia law punitive damages can be awarded for “mean spirited conduct, but also extremely negligent conduct that is likely to cause serious harm.” *TXO Production Corp. v. Alliance Resources Corp.*, 186 W. Va. 656, 413 S.E. 2d 897 (1992), affirmed 509 U.S. 443 (1993). In *TXO*, this Court stated:

Generally, then, we can distinguish between the “really mean” punitive damages defendant, and the “really stupid” punitive damages defendant. We want to discourage both forms of unpleasant conduct, but not necessarily with the same level of punitive damages.

...

By really mean defendants, we signify those defendants who intentionally commit acts they know to be harmful.

...

When the defendant is not just stupid, but really mean, punitive damages limits must be greater in order to deter future evil acts by the defendants. For instance, the United States Supreme Court upheld a punitive damages award with a ratio of more than 117 to 1 in *Browning Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). In the really mean cases, the cynosure in determining the reasonableness of the jury's verdict under *Haslip* and *Garnes* is the amount of punitive damages required to cause the defendant to mend its evil ways and to discourage other similarly situated from engaging in like reprehensible conduct.

Id. at 475-76, 419 S.E.2d at 888-889.

The trial court ultimately found that the evidence presented at trial showed that Defendants' conduct was intentional and demonstrated actual malice, proximately causing the death of Dorothy Douglas. JA000054. Dorothy Douglas' death was not just a tragic and unfortunate outcome, as asserted by Defendants, but was the type of harm that was likely to occur due to the Defendants' "really mean" conduct. Dorothy Douglas' treating physician, testified that her death was the result of dehydration. See JA004653. The testimony from the caregivers of Dorothy Douglas at the nursing home was that the facility was constantly short of staff, and as a result, basic needs of the residents would not be met. The staff did not have sufficient time to provide food, water, and personal hygiene to the residents and the residents would not receive the care they needed. See Trial Testimony of Tara Bowles, JA004171-4193; Regina Abbott, JA004194-4212, and Beverly Crawford, JA004229-4288. There was also testimony that the staffing levels were unbearable unless the State was in the facility for a survey. JA004180-4182. Rather than correct the inadequate staffing, Defendants attempted to deceive state surveyors. When the State had surveyors at the facility, the nurses would assist and the Administrator would even answer call lights. JA004187. This clearly indicates an

intentional attempt to cover up the lack of staff and prevent the State of West Virginia from discovering the true, and inadequate, operation of the facility.

More importantly, there was ample evidence that the Defendants knew of these problems but did nothing to correct them. Beverly Crawford testified at length about problems at the facility and not being able to provide adequate care due to insufficient staff. JA004262-4263. However, when she wrote on a 24-hour report about such problems, she was reprimanded by the Administrator of the facility that the documents would now have to be turned over to the State for abuse and neglect. JA004263. Only a few days later, the 24-hour report on which she had documented issues at the facility was gone. *Id.* This evidence of attempting to hide problems at the facility from the State of West Virginia authorities is reprehensible.

The human resources director at the facility testified that she voiced concerns that the facility was not paying enough to improve recruitment of employees to both the Administrator and Regional Director of Operations, Mark Wilson, and was rejected. JA004471-4472. She further testified that turnover rate for 2009 was 112.3% and that they lost more employees than they were able to hire. JA004469-4477; JA006744. She testified that the biggest reason for the high rate of turnover was that the staff was overworked and short staffed. JA004478. She suggested to the Administrator and Mark Wilson to bring in agency employees so new employees would not get overwhelmed from short staffing, but the requests were denied. JA004478-4479; JA004481-4482; *see* fn. 13.

Mark Wilson testified that he was aware that the facility had been cited for not having adequate staff to meet the needs of the residents. JA004955-4962. He was also aware of complaints of short staffing at the facility. JA004962. He then admitted Defendants were on notice that they needed to staff the facility to meet the needs of residents in the future. JA004958. Emails were put into evidence indicating that even though he knew of the staffing

deficiencies, Mr. Wilson disapproved of using agency or outside staff when it was requested by the facility Administrator. JA004983-4984; *see fn.* 13.

Additionally, the facility was cited, and thereby put on notice, for failing to post accurate and complete staffing information. JA004970-4971; JA006887-6890. Through this exhibit and testimony, it was demonstrated that employees were on the schedule that did not actually work on the day scheduled, yet another indication of the reprehensible conduct of the Defendants. JA004974-4975. In fact, even Defendants' own exhibit created for trial purposes included staff in their calculations to meet the West Virginia numerical state minimums that were not providing care on the day shown. JA005128-5130. Finally, Mr. Wilson testified that the majority of the bonus incentive plan was based on revenue, labor, and accounts receivable, not resident care. JA005115. Meanwhile, outside employees, the agency employees Mr. Wilson disapproved of using in the above-referenced email, were more expensive and thus hurt the facility and the Defendants' bottom line. JA005111.

There was substantial evidence at trial for the jury to find that the Defendants had been intentionally failing to adequately staff the facility despite warnings from the State of West Virginia, families of the residents and their own employees. State surveys, which were admitted into evidence only for purposes of punitive damages, showed that a State of West Virginia survey conducted five months prior to Ms. Douglas' residency cited the facility for not having sufficient staff. Despite this warning from the state, the budget for staff was not increased in any way. JA004934-4985. Not only did Mr. Wilson testify that he remembered the survey from April 2009, but David Parker, the Vice President for the Mid-Atlantic Division, testified that he would conduct monthly operational reviews with his Regional Directors of Operation and they would cover surveys. JA004435-4438. Therefore, Defendants were well aware of the problems at Heartland of Charleston.

The conduct that led to Dorothy Douglas' death was of the "really mean" variety. Indeed, it is inherently evil to allow another human being to be dehumanized and stripped of her dignity by neglect. It is inherently evil to voluntarily undertake a duty to provide for another human being's needs and then allow her to die as a result of not being given enough water to sustain her life. This was the evidence. The jury was entitled to consider all of this evidence and this Court should not disregard it. This verdict cannot be judged simply by the final number awarded. This verdict must be judged by the evidence that produced the number. This jury did not act out of passion or prejudice. This jury heard the facts and the law and rendered a verdict accordingly. A verdict that sent a message to this billion dollar conglomerate, and companies like it, that you cannot purposely disregard the safety and well-being of our citizens for a pure profit motive or you will be punished.

Viewed in the light most favorable to Plaintiff, the evidence shows that Defendants knew that the facility was chronically understaffed and that this understaffing could lead to great harm and even death when entrusted to provide the most basic of needs to these residents, including Ms. Douglas, who could not do so on their own, yet Defendants continued to intentionally under staff knowing what the consequences would be for Ms. Douglas and the other residents.

A. The punitive damages portion of the verdict form was agreed to by the parties and does not constitute error.

As discussed, *supra*, Defendants requested a separate determination of *liability* for each Defendant as it related to punitive damages, yet they wanted only one line for any *amount* of punitive damages awarded. JA005611-5612. The trial court recognized that this was unworkable. If the jury awarded punitive damages against more than one Defendant, up to and including all four, the court would have no way of determining how to apportion the punitive

damages among the Defendants to whom the jury indicated had liability for same.²⁰ *Id.* The trial court inquired of Defendants' Counsel that if their proposal was accepted "who is going to separate" it? JA005614. Defendants' Counsel never addressed this question because at that point, he stated, "I've taken care of it because the verdict form is not going to have a separate line for each defendant now because I understand the Court's inclination." JA005614. The trial court properly found that Defendants did not preserve this assignment of error as they had conceded the issue. JA000019.

B. The trial court did not improperly allow the jury to consider evidence of Manor Care, Inc.'s wealth.

Defendants assert that Manor Care, Inc.'s wealth was the "centerpiece of their punitive damages case" and that Plaintiff's trial strategy "focused relentlessly on using [Manor Care's tax return] to extract an enormous punitive damages award." *See* Defendants' Brief at pp. 30, 33. Defendants' argument could not be more misleading. Manor Care, Inc.'s wealth and the tax returns at issue were never mentioned until closing arguments and were in no way made a feature of the case. Indeed, the centerpiece of Plaintiff's case was the reprehensible and intentional corporate conduct of the Defendants.

Defendants never provided financial information for the individual nursing home, Heartland of Charleston, prior to trial, nor did the Defendants move during trial to admit this evidence.²¹ The financial information the Defendants submitted to the trial court *in camera* on

²⁰ This position by the Defendants demonstrates that all the Defendants acted together and were not concerned about the proper allocation of punitive damages, just on limiting their total exposure.

²¹ Plaintiff's counsel had requested extensive financial information from all of the Defendants during discovery, to all of which Defendants objected. The only net worth information provided was the very tax returns Defendants now complain. Defendants' Counsel even sought the protection of the trial court to delay the production of net worth information until the Court made a determination that it was going to allow punitive damages to go to the jury. JA003829-3830; JA003769. The financial information at issue was the only financial information produced before the verdict was rendered. However, Defendants produced significant other financial information at the June 28, 2012 hearing on the post trial motions (*see* Defendants' Brief at 33 citing JA001906-1913), all of which were available to them during trial, but David Parker testified it was never requested by defense counsel. JA006697-6698.

day one (1) of trial (JA005829-6381) contained no financial information for Health Care & Retirement Corporation of America LLC, the Defendant that holds the license to operate Heartland of Charleston. Additionally, Katherine Hoops, the Vice-President and Director of Tax, Internal Audit and Risk Management for HCR Manor Care Services and Manor Care, Inc., testified that the sole member of Health Care & Retirement Corporation of America LLC is Manor Care, Inc. JA000038; JA004921; JA006751. Consistent with *TXO*, the Manor Care Defendants could not be less than forthcoming during discovery and then claim foul when the Plaintiff is forced to use the only information available to them at trial. *TXO*, 187 W.Va. at 477.

While Defendants assert that there was not sufficient evidence to warrant punitive damages against Defendant Manor Care, Inc., this issue is waived by Defendants' failure to renew their motion for judgment as a matter of law at the close of evidence. *See* Plaintiff's Brief at Section IV (citing *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S.E. 782 (1893)). Further, Plaintiff submits that substantial evidence supports that Defendants' conduct justified punitive damages. *See* JA002242-2267, and Plaintiff's Brief at Section V.

Defendants' assertion that Plaintiff mischaracterized Defendant Manor Care, Inc's financial condition during closing argument is also baseless. Plaintiff did not misrepresent the tax returns but pointed out the company's gross revenues. Defendants did not object to Plaintiff's closing argument and further did not address the financial information in order to differentiate revenues versus profits or in any other manner whatsoever during their own closing argument. Thus, Defendants' assertion of error is waived and without merit.

VI. THE PUNITIVE AWARD IS NOT EXCESSIVE AND DOES NOT REQUIRE REMITTUR.

Defendants assert that the trial court's review pursuant to *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991) *holding modified by Perrine v. E.I. du Pont de*

Nemours & Co., 225 W. Va. 482, 694 S.E.2d 815 (2010) was fundamentally flawed because the court improperly relied on Defendants' insurance coverage. Although Defendants' statement is somewhat unclear, they also take issue with the fact that the trial court held that the insurance was one of the factors that "weigh[ed] heavily on the scales of justice when determining whether the \$80 million punitive damage award is appropriate under West Virginia law." JA000034. Plaintiff submits that the trial court undertook an appropriate analysis.

The trial court noted that Defendants submitted various financial evidence during the post-trial hearings to establish the punitive damage award "effectively wipes out" the profit of over 500 HCR Manor Care nursing homes (JA002984) and "suggest[ed] the award may bankrupt (JA006618) and destroy the Defendants (JA006618)."²² JA000045; *see also* JA006619-6623. The trial court found that when the court "specifically asked Defendants' Counsel whether this evidentiary proffer was intended to demonstrate the inability by the HCR Manor Care Defendants to pay the punitive damage award. . . Counsel tactfully avoided an answer to the question." JA000045; *see also* JA006568-6569.

The trial court appropriately took into consideration that the HCR Manor Care Defendants purchased \$125 million in liability insurance and that there is no coverage dispute and no reservation of rights. JA001756. The trial court took judicial notice, with no exception taken by the Defendants, that the insurance policies *expressly* provide coverage for punitive damages. JA000045. The trial court was appropriate in its consideration of this aggravating factor, determining that Defendants did profit by its intentionally reckless operation of Heartland of Charleston and that "in reality, this verdict will not wipe out the Defendants financially. . .The

²² While both sides would agree that bankrupting a defendant(s) is not what punitive damages are designed to accomplish, Defendants have attacked the trial court for reference to Defendants' insurance. It must be noted that Defendants argued before the lower court that the punitive verdict would bankrupt the Defendants and the trial court found that in fact this was a misrepresentation as there was insurance that would cover the entire verdict.

only economic cost to the HCR Manor Care Defendants adduced in the post-trial review is a potential, un-quantified increase in future insurance premiums.” *Id.*

A. The amount of punitive damages is not disproportionate to the amount of compensatory damages.

The jury’s punitive award is a 7 to 1 ratio when compared with the compensatory award.²³ There are numerous factors to consider in evaluating the reasonableness of this punitive to compensatory comparison, but no bright line test. In evaluating these factors, the evidence supports the trial court’s finding that the Defendants’ conduct was intentional, planned, deliberate, demonstrated malice toward their residents, including Dorothy Douglas, and not only proximately caused her death, but caused Ms. Douglas to suffer a slow agonizing death by dehydration over a period greater than nineteen days. JA000022; JA000041-45.

This Court has held that “the outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.” *TXO Production Corp. v. Alliance Resources Corp.*, 186 W. Va. 656, 413 S.E. 2d 897, Syllabus Point 4 (1992), affirmed

²³ Defendants assert the capped amount should be used to determine the ratio; this is an inaccurate statement of the law. To accept their argument would mean the legislature intended to create a punitive damage cap at the same time they enacted the MPLA cap. If that was the legislatures’ intent, they could have created such a punitive cap, which they have not done. Defendants’ citations to authority from other jurisdictions on pages 37-38 of their Brief are misplaced and can be easily distinguished from this matter. In *Kimbrough v. Loma Linda Dev., Inc.*, 183 F.3d 782, 785 (8th Cir. 1999) and *Forsberg v. Pefanis*, 2009 WL 4798124 (N.D. Ga. Dec. 8, 2009), the statutory cap applied in both cases, set forth in 42 U.S.C. §1981a(b)(3)(A), caps the sum of both compensatory and punitive damages at \$50,000. *Kimbrough*, 183 F.3d at 785; *Forsberg v.* *9, *12. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 793 (8th Cir. 2004) was an employee discrimination case in which the Court “assumed” that the claims and jury award were not capped by Title VII and the Arkansas statutes. *Williams*, 378 F.3d at 793. The award was remitted by the trial court but there is no reference to it being statutorily capped. The Eighth Circuit Court of Appeals found the discrimination and harassment of the plaintiff was not “so egregiously reprehensible that it justify[d] an unusually large award.” *Id.* at 799. There is no statutory cap on punitive damages affecting the matter at bar. Further, this case does not involve an issue of harassment in the workplace. It involves pain, suffering, and the death of an individual.

509 U.S. 443 (1993).

In *State Farm Mutual Automobile Ins. Co. V. Campbell*, 123 S. Ct. 1513 (2003) (referred to as *State Farm* hereinafter), the U.S. Supreme Court, focusing upon the factors in *BMW of North America v. Gore*, 517 U.S. 559 (1996) (referred to as *Gore* hereinafter), held that Courts are to ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. See *State Farm*, op cit, at 1524.

The factual circumstances in this case are distinguishable from the facts in *State Farm*. The trial court found that the evidence at trial was sufficient for the jury to conclude that Ms. Douglas was put through nineteen days of suffering, harmed, and ultimately killed by the intentional conduct of the Defendants. JA000041-45. Further, the time period, although lengthy, is much narrower than found in *State Farm*, and specifically related to Plaintiff's claims in this matter. The trial court also found there was sufficient evidence from which the jury could reasonably conclude that the Defendants' conduct was intentional, reprehensible, self-serving, and financially motivated. JA000034; JA000043-45; JA000050.

In *Radec, Inc. v. Mountaineer Coal Devel Co.*, supra, a jury awarded punitive damages in an amount many times greater than its compensatory damages and this Court held the evidence of the Defendant's "fraudulent conduct warranted the amount of punitive damages." *Radec*, 210 W. Va. at 9, 552 S.E.2d at 385. In *Radec*, the defendant had induced the plaintiff to rehabilitate the defendant's mine which the plaintiff had been mining with a false promise that the plaintiff could mine coal from another mine of the defendant's which would have been much more lucrative than the unprofitable rehab work. The evidence clearly showed that the defendant "knew" that the plaintiff could not survive financially if it rehabilitated and mined the first mine only, that the defendant would "benefit" from the plaintiff's rehab work, and that the defendant deceived the plaintiff with its false promise in order to reap such benefit, even though it never

intended to follow through on its promise to have the plaintiff mine the profitable mine. This Court found these actions were “evil and self-serving.” *Id.*

Similarly, the evidence in this matter is that the Defendants’ conduct was reprehensible, self-serving, intentional, demonstrated actual malice, and motivated by profit with evil intent, and unlike *Radec*, involved the loss of human life. While the ratio of punitive damages in this case is greater than 5:1, it is still a single digit multiplier and the facts of this case support the finding that the Defendants acted with actual evil intent. JA000049; JA000052-53.

B. The amount of punitive damages is not grossly disproportionate to civil or criminal penalties for comparable conduct.

While the Defendants cite to the United State Supreme Court’s opinion in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), raising for the first time on appeal comparable civil and criminal penalties,²⁴ they fail to conduct a complete analysis of the applicable “civil or criminal penalties that could be imposed” based on their conduct. *Gore*, 517 U.S. at 583-85, 116 S. Ct. at 1603. Defendants do not consider in their analysis the penalty for killing a resident based on intentional conduct which they knew would likely cause serious bodily harm or death.²⁵

The Court in *Gore* looked to other states for comparable civil and criminal penalties. *Gore*, 517 U.S. at 583-85, 116 S. Ct. at 1603-04. While murder usually requires an element of intent, a defendant can be found guilty of second degree murder based on actions demonstrating a grossly reckless disregard for human life and doing so with extreme indifference to the life and safety of others. To find the defendant acted with gross recklessness and with the kind of extreme indifference to constitute second degree murder, a defendant’s acts must be something

²⁴ As with many of Defendants’ other arguments, upon information and belief this issue was never raised before the trial court and should therefore be waived.

²⁵ The trial court found that Defendants conduct rose to the level of actual malice. JA000053-000054.

akin to an individual intentionally shooting a gun into a crowd of people, *State v. Douglass*, 28 W. Va. 297, 300 (1886), or throwing a dangerous object off a roof into a crowded street below. See *State v. Saunders*, 150 S.E. 519, 520 (W. Va. 1929). Other analogous examples would include driving a car at a high rate of speed, in inclement weather, while highly intoxicated. See *Davis v. State*, 593 So. 2d 145 (Ala. Crim. App. 1991).

Other jurisdictions that recognize such “depraved heart” murder generally recognize three elements: 1) high probability that conduct will result in the death of a human being; 2) a subjective appreciation of the risk; and 3) a base anti-social purpose or motive. For example, the Utah Supreme Court defines “abandoned and malignant heart” as “depraved indifference,” and “an utter callousness toward the value of human life and a complete and total indifference as to whether one’s conduct will create the requisite risk of death of another.” *State v. Standiford*, 769 P.2d 254 (Utah 1988). In Alabama, the court gave perhaps the best lay definition when it found that a person is guilty of depraved indifference when that person is one “bent on mischief” who “acts with a ‘don’t give a damn attitude,’ in total disregard of the public safety.” *King v. State*, 505 So. 2d 403 (Ala. Cr. App. 1987).

The facts of this matter constitute second degree murder, a crime which in West Virginia is punishable by up to forty (40) years in prison. W. Va. Code § 61-2-3. Defendants knew there was a high probability that insufficient staffing would result in abuse and neglect; acknowledged the risk in their own policies and procedures; and had a base anti-social purpose or motive – placing profits over the well-being of the residents entrusted to their care. Defendants’ assertion of error is without merit.

CONCLUSION

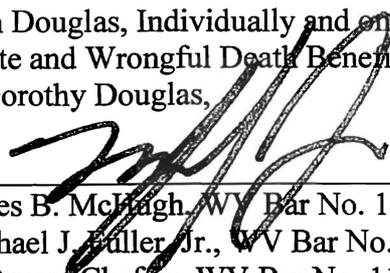
The limited arguments made by Defendants, as well as the way they are framed, are telling. Defendants have avoided sufficiency of the evidence arguments along with many others

typical of such appeals, and have focused on attempting to limit their financial liability at all costs so that they may continue to do what they do – operate a multitude of nursing homes in numerous states with profit as its central focus, not the residents who reside in their facilities and their well-being. These residents are not employed, have no dependents, or a long life expectancy, and many of them have dementia – and are neglected or abused.

Plaintiff submits that a person such as Ms. Douglas, who is forced by abuse or neglect to suffer while helpless and incapacitated should receive greater, not less, compensation. A person who is forced by abuse or neglect to suffer during the waning years of life should receive greater, not less, compensation. A person or entity who abuses or neglects another who is helpless, incapacitated, and in the waning years of life should receive greater, not less, punishment. A people should be judged by how they treat the helpless among them. The Defendants in this matter made conscious and intentional decisions in the operation of their facilities and in the trial of this matter. A Kanawha County jury has spoken, and the jury’s verdict should be affirmed.

Wherefore, Plaintiff requests that this Court affirm the Circuit Court of Kanawha County’s verdict in this matter, and for all other relief, both general and specific, to which he is entitled. Respectfully submitted, this the 25th day of September, 2013.

Tom Douglas, Individually and on behalf of the
Estate and Wrongful Death Beneficiaries
of Dorothy Douglas,

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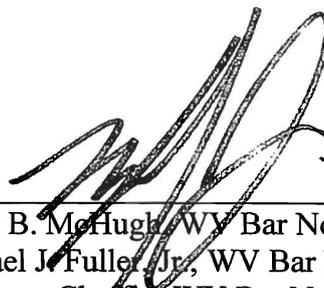
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 25th day of September, 2013, the foregoing Respondent's Brief was deposited in the U.S. Mail contained in a postage paid envelope addressed to Counsel for all other parties to this appeal as follows:

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