

Court Imposes Corporate Liability on Nursing Homes
(10/9/12 The Legal Intelligencer) By Ben Present

While its seminal decision on corporate liability for nursing homes awaits judgment from the Pennsylvania Supreme Court, the state Superior Court has kicked a similar matter back to Philadelphia court for the possible addition of punitive damages.

After a round of cross-appeals in *Hall v. Episcopal Long Term Care*, a three-judge panel determined a deceased woman's estate presented enough evidence about understaffing, falsified care logs and disregard of the woman's pain to get the issue of punitives in front of a Philadelphia jury.

The case of Sallie Mae Hall - the deceased former patient who was put in the home after having a stroke - has been brought by her estate, which is administered by her great-granddaughter, June Hall.

After weighing the evidence presented at the 2010 trial, including testimony suggesting that The Philadelphia Nursing Home, owned at the time by Episcopal Long Term Care, beefed up its staffing in time for state inspections and then let it dwindle back to inadequacy, President Judge Correale F. Stevens said a jury should have been permitted to decide if the nursing home's conduct rose to the level of reckless disregard for the patient's rights. The facility denied ever doing so.

The trial court had limited the negligence, damages and injury claims in Hall to after May 2003, because of the statute of limitations. Sallie Mae Hall died in January 2005 and June Hall's lawsuit came in May of that year.

The nursing home argued it should have been granted a directed verdict or judgment notwithstanding the verdict on the understaffing claims because there was no evidence of understaffing in Sallie Mae Hall's wing of the facility.

The court disagreed.

In the *Hall* case, "the record was replete with evidence that the nursing home was chronically understaffed, management was aware of the understaffing, and patients, including the deceased, received improper patient care due to the inadequate staffing levels," Stevens wrote in a 46-page opinion for the panel.

He added the nursing home had "constructive knowledge" of the understaffing, which he said the record showed was a "substantial factor in bringing about harm to the deceased."

The hospital had tried to discredit the testimony of several witnesses testifying for the estate, calling them "disgruntled former employees," but the court disagreed.

In short, the cross-appeals fell largely in favor of the estate. Pending an appeal to the high court, the case will head back to the Philadelphia Court of Common Pleas for a trial solely on punitive damages.

"Based on the aforementioned, we conclude the trial court erred in refusing to submit to the jury the question of whether an award of punitive damages was appropriate," Stevens said. "We are simply not persuaded by the trial court's conclusion that 'punitive damages are not warranted as [Episcopal's] negligence did not rise to the level of reckless disregard.'"

"Rather, we conclude the estate set forth sufficient evidence, which, if believed by the jury, would rise to the level of reckless disregard as set forth by *Scampone*," Stevens said.

Stevens was referring to a previous Superior Court decision in *Scampone v. Grane Healthcare*, a case in which a panel led by Judge Mary Jane Bowes decided that because nursing homes are similar to hospitals, health maintenance organizations and medical professional corporations, they can be held corporately liable under Pennsylvania law.

In that case, *Bowes* said nursing homes, like hospitals, provide "comprehensive and continual physical care" for patients, unlike a physician's out-patient office, which is not susceptible to corporate liability claims.

And the estate's attorney agreed.

Noting that he represented hospitals for more than 10 years, plaintiff's attorney Stephen Trzcinski said: "I'm surprised that this is even a question."

Other arguments failed on June Hall's standing to sue, and that Episcopal should have been granted JNOV based on the court's decision to let the jury draw a line between Sallie Mae Hall's screams and the home's administration of her restorative care or medicines prescribed.

A jury found Episcopal, now Fairmount Long-Term Care, liable for negligent care and awarded the estate \$119,000 in compensatory damages. The trial court, however, granted a motion for a directed verdict on punitives from Episcopal after the defense rested.

There was a host of testimony at trial, which the panel outlined in detail in its opinion. After devoting about 25 pages of the opinion to reviewing trial testimony, Stevens said the lower court erred.

Among the testimony were statements from nurses and supervisors from the nursing home that they often didn't have enough time to bathe residents. There was also testimony on insect and pest control problems at the West Philadelphia facility. Residents were left to sit in dried urine and fecal matter, witnesses said, according to the opinion.

An expert doctor that the estate called testified the nursing home's care logs revealed an "absence of cleanliness" and it appeared Sallie Mae Hall had often been left to "lie in her own filth."

***Scampone* Pending**

Trzcinski, who specializes in nursing home liability matters, also represents the plaintiff in *Scampone* and argued the case before the justices last year.

Standing in the way of a Pennsylvania court allowing corporate negligence for a nursing home, it seems, is the high court's seminal 1991 decision in *Thompson v. Nason Hospital*, where the state Supreme Court adopted the theory of corporate negligence for hospitals.

The defense in *Scampone*, meanwhile, argued the case makes no mention of nursing homes and urged the justices not to extend the jurisprudence beyond hospitals and HMOs.

According to Trzcinski, of Wilkes & McHugh in Philadelphia, a reversal from the high court in *Scampone* would not affect the ruling in Hall.

First, Trzcinski said, the nursing home declined to brief the issue beyond saying in a footnote that, if *Scampone* is reversed then Episcopal would be entitled to judgment notwithstanding the verdict on corporate liability and a new trial on all issues.

So the attorney said waiver was at play, while adding: "As an experienced appellate practitioner, I would have tried to develop that issue."

Even if Episcopal had fully briefed the issue, though, Trzcinski said his position would be similar to the one he and his cocounsel argued in *Scampone* last year: The nursing home at issue did not have to be held accountable under a theory of "corporate" negligence per se.? Rather, the organization as a whole had to be held accountable.

Corporate negligence, Pennsylvania law spells out, is a basis for hospital liability separate from the liability of the actual practitioners who rendered the care in question.

Justice Max Baer focused on that issue during the arguments of *Scampone*. More than once, the jurist asked why a litigant suing a nursing home couldn't proceed against the hospital under a theory of ordinary negligence.

Relying on that line of thought, Trzcinski said an adverse ruling in *Scampone* should not affect his case on remand.

"Quite frankly, no matter how the Supreme Court rules in *Scampone*, I don't think it adversely affects our case," Trzcinski said.

Trzcinski said he was also pleased the unanimous panel declined to find merit in the nursing home's argument that its care was adequate because nurses in Sallie Mae Hall's wing apparently provided more than the state minimum of 2.7 hours of care per patient per day.

That didn't mean the facility's care was not lacking, Trzcinski said.

The attorney said courts have allowed defendant nursing homes to rely too heavily on those state guidelines in proving they were not understaffed when, in cases such as this one, the resident's needed far more than the minimum.

"The minimum doesn't come close," Trzcinski said. "This might be the only decision that makes that point."

By finding the estate made a valid claim for understaffing, the "court clearly rejected that argument," he said.