

## New Jersey Judge Calls for Retrial in Case of Nursing Home Act

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A New Jersey trial judge in Hudson County recently ordered the retrial of a nursing home case with a \$13.2 million verdict because of bad instructions to the jury concerning the Nursing Home Act (NHA). The case is *Estate of Dwyer v. Harborview Health Care Center*, which involved Mary Dwyer's 77-day stay at a nursing home where she developed bed sores, lost 20 pounds, underwent seven debridement procedures, two bone shavings, and a colostomy. She was subsequently transferred to a hospital, underwent two more debridement procedures, and died.

After a seven week trial, the jury awarded Dwyer's estate a total of \$13.2 million—the sum of \$8.2 million in punitive damages and \$5 million in compensatory damages. Of the compensatory damages award, \$3 million was for violation of the NHA's "bill of rights," and \$1 million was for violation of the NHA's "responsibilities" of nursing homes.

Trial judge Nesle Rodriguez initially vacated the \$4 million in compensatory damages awarded under the NHA because there was a "lack of clarity in the interplay between a common law negligence claim against a nursing home and the unique cause of action created by" the NHA. She found the relief provided by the two to be "indistinguishable."

Subsequently, both sides moved for reconsideration. In the interim, the appellate division decided *Ptaszynski v. Atlantic Health Systems, Inc.*, 440 N.J. Super 24 (2015). Relying in part on *Ptaszynski*, Rodriguez said it was plain error for the jury not to be instructed on the difference between the NHA and common law claims. Rodriguez held that "the impermissible double damages awarded in this case resulted from improper jury instructions and a verdict sheet that failed to provide the jury with an understanding on how to allocate damages between the common law negligence claims and the related" NHA claims.

The *Ptaszynski* holding, issued in March of this year, was important because it effectively held that no private cause of action existed for violation of the "responsibilities" of nursing homes under *N.J.S.A. 30:13-3a* to *j*. This includes no right of action for violation of the responsibility of ensuring "compliance with all applicable state and federal statutes, rules and regulations." In *Ptaszynski*, the court analyzed whether *N.J.S.A. 30:13-4.2*, establishing the right to a cause of action for "violation of this act," was intended to include a right of action for violation of the responsibility to comply with state and federal statutes and regulations. According to the court, *N.J.S.A. 30:13-4.2*, the words "this act" only meant the statutory provisions pertaining to security deposits of nursing home residents, and did not refer to a violation of any other provision of the NHA.

The *Estate of Dwyer* and *Ptaszynski* cases both demonstrate the confusion that could be caused at the trial level when improper instructions are given to the jury on the interplay between common law negligence causes of action and claims under the NHA. Aggressive motion practice addressing these issues as early as possible may give some opportunity to have the court dismiss extraneous claims and prepare the case for presentation at trial in a manner consistent with the NHA.

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