

**ALTERNATIVE CAUSES OF ACTION:  
ARE PLAINTIFFS DOUBLE-DIPPING???**

**Jacquelyn Core – Steptoe & Johnson Long Term Care Industry Team Co-Chair  
Jace Goins – Steptoe & Johnson Professional Liability Practice Group Leader**

## **Alternative Causes of Action: Are Plaintiffs Double-Dipping???**

Jacquelyn Core – Steptoe & Johnson Long Term Care Industry Team Co-Chair

Jace Goins – Steptoe & Johnson Professional Liability Practice Group Leader

Plaintiff's attorneys have always done their best to maximize damages in their cases, but now there is a new trend emerging in West Virginia. Plaintiff's attorneys are asserting, and in some instances recovering damages under, alternative, duplicative, or mutually exclusive causes of action. Such causes of action obviously either were not intended for simultaneous assertion which might provide duplicative recovery or they contain elements which are necessarily exclusive of one another.

The alarming new trend in West Virginia encompasses not only the simultaneous assertion of these alternative causes of action, but many West Virginia judges refusing to grant summary disposition of one cause of action or the other and/or refusing to force plaintiff's attorneys to choose between them. In several instances statewide West Virginia judges have actually allowed such alternative causes of action to proceed to trial and have allowed plaintiffs to pursue recovery therefore from a West Virginia jury.

This article has three purposes. First, the article has introduced you to the concept of alternative, duplicative, or mutually exclusive causes of action. Second, the article is intended to allow and encourage you to look for and oppose alternative causes of action. Third, this article will provide you with two examples of alternative causes of action that West Virginia judges have allowed to proceed to trial. The two examples illustrate causes of action in the long term care arena not intended for simultaneous assertion which might provide duplicative recovery and causes of action in the personal torts arena which contain elements which are necessarily exclusive of one another. Many other alternative causes of action exist, including some pending in current lawsuits

we, and likely you, are defending, but the two examples below should provide the type of introduction which will help you to more easily recognize alternative causes of action to attempt to curtail this alarming trend.

The Long Term Care Arena: Causes of action not intended for simultaneous assertion which might provide duplicative recovery

### The Medical Professional Liability Act and the Nursing Home Act

Plaintiff's counsel simultaneously have been seeking recovery under, and many trial courts simultaneously have allowed pursuit of recovery under, both the West Virginia Medical Professional Liability Act (MPLA) and the West Virginia Nursing Home Act (NHA). These two causes of action were not intended to serve the same function or to compensate for the same losses. Nonetheless, plaintiff's counsel are using them that way to provide a potentially duplicative recovery. To understand how this double recovery is pursued, we need to examine how both statutes operate.

The regulation of skilled nursing or long term care facilities is governed by the NHA. To that end, the Office of Health Facility Licensure and Compliance, OHFLAC, is the only entity in West Virginia entitled to determine statutory and regulatory deficiencies of skilled nursing or long term care facilities. But, skilled nursing or long term care facilities are health care providers subject to the MPLA and the standards of care it imposes in instances of alleged patient care liability. Even in instances where OHFLAC reported no deficiencies with respect to the resident who is the subject of a patient care liability case, plaintiff's attorneys are attempting to make recoveries under the West Virginia Nursing Home Act (NHA).

In West Virginia, OHFLAC conducts inspections, investigates complaints,

determines deficiencies, assesses penalties, and approves plans of correction submitted by a long term care or skilled nursing facility in the state to correct deficiencies. See W. Va. Code §§ 16- 5C-1 et seq. The statute defines a deficiency as "a nursing home's failure to meet the requirements specified in . . . 16-5C-1 et seq. . . . and rules promulgated thereunder." W. Va. Code § 16-5C-2(a). Pursuant to the statute, OHFLAC has the sole responsibility for enforcement of the statute. W. Va. Code 16-5C-3. Nothing in the statute provides for a cause of action absent a finding by OHFLAC that a deficiency has occurred. See W. Va. Code §§ 16-5C-1, et seq. The statute intends that a civil remedy would arise only upon a finding of a deficiency with regard to the resident at issue and expressly states that this remedy is available only if injuries occur as a result of that finding. W. Va. Code § 16-5C-15. Nonetheless, plaintiff's attorneys continue to attempt to misuse the NHA to gain duplicative recovery when no deficiency with respect to the resident in question has been identified.

In some instances the plaintiff's own experts make unsupported and improper allegations that relevant statutory and/or regulatory deficiencies occurred, but in such instances the plaintiff cannot demonstrate with any accuracy that any nursing home statute or regulation was violated with respect to the resident in question by means of retrospect, because there were no relevant deficiencies determined by OHFLAC during the residency, the relevant time of regulation. In these instances the plaintiff's counsel attempts to bring to court his or her own individuals, disclosed as experts, to offer legal opinions that there

were deficiencies where the State previously found none. To do so in the context of a civil action which post-dates the care in question and sometimes post-dates the death of the resident in question, usually nearly two years after-the-fact, deprives the skilled nursing or long term care facilities of their statutory right to appeal those findings.

In reality, whether a deficiency or complaint of any kind occurred during a skilled nursing or long term care residency is a matter of public record. W. Va. Code § 16-5C-16. Plaintiff's attorneys attempt to modify that record to their benefit through expert testimony to allow the alternative cause of action to proceed. Moreover, sometimes plaintiff's counsel does not even attempted to allege how any deficiency or failure under the nursing home administrative statutes could have resulted in the damages claimed, despite that requirement being specifically delineated in the NHA.

The West Virginia Medical Professional Liability Act (MPLA) expressly includes claims against an agent, officer, or employee of the health care provider. "Health care provider" is defined by the MPLA:

"Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services . . . or an officer, employee or agent thereof acting in the course and scope of such officer's, employee's or agent's employment.

W. Va. Code § 55-7B-2(g) (2002)(emphasis added).

The skilled nursing or long term care facilities subject to the lawsuits in question are a "health care facility" as defined by the Act. "Health care facility" means "any

clinic, hospital, nursing home, or assisted living facility, including personal care home, residential care community and residential board and care home, or behavioral health care facility, or comprehensive community mental health/mental retardation center, in and licensed by the state of West Virginia and any state operated institution or clinic providing health care.” W. Va. Code § 55-7B-2(f)(emphasis added). As a result the MPLA obviously is intended to apply to skilled nursing or long term care facilities. The legislative intent of the MPLA with regard to nursing homes is expressly stated within the statute. W. Va. Code § 55-7B-1 (2003). In addition, the statute specifically covers agents and employees of nursing homes. W. Va. Code § 55-7B-2 (f) & (g).

The Legislature made a point of articulating its particular public policy concerns with respect to long term care facilities:

The Legislature further finds that medical liability issues have reached critical proportions for the state’s long term health care facilities, as: (1) Medical liability insurance premiums for nursing homes in West Virginia continue to increase and the number of claims per bed has increased significantly; (2) the cost to the state medicaid program as a result of such higher premiums has grown considerably in this period; (3) current medical liability premium costs for some nursing homes constitute a significant percentage of the amount of coverage; (4) these high costs are leading some facilities to consider dropping medical liability insurance coverage altogether; and (5) the medical liability insurance crisis for nursing homes may soon result in a reduction of the number of beds available to citizens in need of long term care.

W. Va. Code § 55-7B-1 (2003). The West Virginia Supreme Court has held that “[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted

without resorting to the rules of interpretation.” Syllabus Point 2, State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968). The plain meaning of the MPLA is that it applies to "any health care provider," including skilled nursing or long term care facilities. W. Va. Code § 55-7B-6(a), supra.

In contrast the State Nursing Home Act (NHA) provides the means by which the federal and state statutes and regulations governing the funding of nursing home facilities are enforced. See W. Va. Code 55-5C-1 *et seq.* Under the NHA, the Secretary of the Department of Health and Human Resources or his or her designee is charged with enforcing the rules and standards promulgated by the state nursing home statute. W. Va. Code 16-5C-3 (1997). In West Virginia, OHFLAC is the sole authority designated by the State to establish and enforce standards for the regulation of nursing homes, which includes implementing procedures to enforce compliance with the statute and the regulations issued thereunder. See generally, Wolford by Mackey v. Lewis, 860 F. Supp. 1123, 1127-28 (S.D.W. Va. 1994). The NHA was created and is enforced to ensure that federal Medicaid and Medicare funding is provided only to those facilities which meet the standards of the federal statutes. W. Va. Code § 16-5C-1. The NHA does not establish a standard of care for health care providers and is not a substitute for the State's MPLA in cases where the plaintiff is alleging medical professional negligence in the care, treatment, and provision of health care services.

The NHA gives a skilled nursing or long term care resident the right to bring a cause of action if the resident incurred damages as a result of a finding made by OHFLAC.

Specifically, the statute provides in relevant part as follows:

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. . .damages shall be assessed. . . .

W. Va. Code § 16-5C-15(c)(1997). The director or his or her designee has sole authority for enforcement of the Act including the administration of civil remedies. W. Va. Code § 16-5C-3(k) & (m).

Several jurisdictions which have similar state nursing home statutes have determined that suits sounding in medical negligence are still governed by the respective state's medical liability statutes and not by their nursing home administrative statutes. Makas v. Hillhaven, Inc., 589 F. Supp. 736, 741 (M.D.N.C. 1984); Dunagan by & Through Dunagan v. Shalom Geriatric Ctr., 967 S.W.2d 285, 288 (Mo. Ct. App. 1998); and Richard v. La. Extended Care Ctrs., 835 So. 2d 460 (La. Jan. 14, 2003)(Nursing Home Residents' Bill of Rights not intended to remove malpractice claims from the coverage of the Louisiana Medical Malpractice Act). Nonetheless, our judges have been allowing medical negligence



claims to proceed simultaneously under the MPLA and the NHA, even in instances where OHFLAC did not find a deficiency with respect to the particular resident.

In the Makas case (referenced above), a claim was brought by the administratrix of the estate of a resident against the owners and operators of a nursing-home alleging violation of the "Nursing Home Patients' Bill of Rights." Id. at 738. The defendant in Makas was defined under that state's medical liability statute as a health care provider. Id. at 740. Plaintiff contended that she need only establish that a violation of the statute proximately caused her injury. Id. The Court held that a statutory violation, or negligence *per se*, does not establish a standard of care applicable in negligence actions, and, further:

To hold that the Nursing Home Patients' Bill of Rights sets the standard to which nursing homes are held accountable in negligence damage actions would ignore the purpose of the negligence *per se* doctrine and the malpractice law of this state. It would permit the trier of fact to set its own standard of care for health care providers and speculate virtually without limits on the culpability of their conduct.

Id. at 741.

The Makas Court further reasoned:

The patient's rights are so broadly stated that submission of them to a jury as the standard of care would result in a speculative, *ad hoc* verdict completely unguided by any rational legal standards. The Nursing Home Patients' Bill of Rights is a laudable statement of policy and requirements imposed on licensed nursing homes with a remedial enforcement scheme . . . but it is not a substitute . . . for the well established standard of care to be applied in negligence actions for damages against health care providers.

Id. at 742. Because the plaintiff in Makas offered no expert testimony, other than the Nursing Home Patient's Bill of Rights, to establish the standard of care against a statutory health care provider, the Court directed a verdict for the defendant. Id. at 743.

Even if a private cause of action were cognizable under the State Nursing Home Act, actions against health care providers in West Virginia are governed by the MPLA. The State Nursing Home Act does not establish a negligence *per se* standard of care for health care providers. West Virginia courts should require plaintiffs to establish, within the confines of the MPLA, that defendants deviated from the appropriate standard of care, which, as stated, is not established by the State nursing home statutes and regulations. These alternative and duplicative causes of action were obviously not intended to proceed simultaneously.

The Personal Torts Arena: Causes of action with mutually exclusive elements\_\_\_\_\_

Defamation and Insulting Words

Plaintiff's counsel in West Virginia have asserted defamation and insulting words claims simultaneously. These causes of action illustrate claims with mutually exclusive elements. They are a second type of alternative cause of action which has been allowed to proceed simultaneously at trial. In these cases the plaintiff's counsel and the court fail to grasp that insulting words and defamation are mutually exclusive causes of action. See Mauck v. Martinsburg, 167 W. Va. 332, 333, 280 S.E.2d 216, 218 (1981).

In West Virginia defamation requires proof that there was a publication of a false and defamatory statement about the complaining individual to a third party who did not have a reasonable right to know about the statement. Crump v. Beckley Newspapers, Inc., 173 W. Va. 699,

320 S.E.2d 70 (1983). The statement must be made at least negligently, and it must cause harm to the complaining individual. Id. The West Virginia Supreme Court has held that an insulting words claim requires a plaintiff to show that there was (1) an insult “of an unprivileged nature written or stated to the victim of the insult alone and thus not published” and (2) that the words are of the sort that “tend to violence” such as “epithets and racial slurs.” Mauck v. Martinsburg, 167 W. Va. 332, 333, 280 S.E.2d 216, 218 (1981)(emphasis added).

The West Virginia Supreme Court has held that the insulting words statute was intended to create a cause of action only “for two situations not otherwise actionable under common law defamation.” Id.(emphasis added). Given plaintiff’s counsel’s allegations that conduct at issue also constitutes defamation, in such instances they should be, but have not been, precluded from urging an inconsistent view of facts that is necessary to support both theories.

The Mauck decision (referenced above) involved a letter which set forth the reasons for an employee’s dismissal to a significant number of people, including the city council and city attorney. Mauck v. Martinsburg, 167 W. Va. 332, 333, 280 S.E.2d 216, 218 (1981). In Mauck, the Court held that a city manager did not defame a former city employee when he sent a letter stating the reasons for the employee’s dismissal to members of the city council and the city attorney. 167 W. Va. at 333, 280 S.E.2d at 218. The letter accused the employee of “incompetence and inefficiency” and “carelessness and negligence in the use of property of the city.” Id.

The plaintiff’s counsel asserting these alternative causes of action ignore the first part of the initial element of insulting words which states that the communication must be to the plaintiff alone (not published as required in instances of defamation). Asserting both causes of action requires plaintiff’s counsel to argue alternative versions of the facts: that plaintiff alone

received these communications and, to the contrary, that the communications were published. Lack of publication negates required elements of a defamation or an invasion of privacy claim.

Because defamation and an insulting words claim are mutually exclusive, and because any plaintiff must contradict himself or herself to satisfy the necessary elements of both torts, these alternative causes of action should not be allowed to proceed simultaneously. The Mauck Court recognized the mutually exclusive nature of the two causes of action. The Court wrote:

We conclude that the [insulting words] statute was intended to create a cause of action for two situations not otherwise actionable under common law defamation: first, for those insults of an unprivileged nature written or stated to the victim of the insult alone and thus not "published"; second, for insulting words which tend to violence and to a breach of the peace, which would include epithets and racial slurs. The first cause of action was never available under the common law of defamation, and the second was available only with proof of special damages.

Therefore, the two elements of (1) lack of a publication requirement, and (2) a cause of action for insulting words which tend to violence and a breach of the peace are the only differences between the law of the insulting words statute and common law defamation. In all other respects the substantive law of the statute is identical to that of common law defamation.

Mauck, 167 W. Va. at 336-337, 280 S.E.2d at 219-220 (1981).

Despite the obviously mutually exclusive nature of the two torts, as recognized in Mauck v. City of Martinsburg, 167 W. Va. 332, 336-337 280 S.E.2d 216, 219-220 (1981), trial courts have allowed both causes of action to proceed simultaneously, thereby allowing the possibility of a double recovery never intended by the legislature when creating the insulting words cause of action.

Hopefully, this article has introduced you to the concept of alternative, duplicative, or mutually exclusive causes of action and will allow and encourage you to look for and oppose

alternative causes of action. The two examples of alternative causes of action that West Virginia judges have allowed to proceed to trial contained in this article are not the only ones, but they illustrate two different kinds of alternative causes of action: causes of action not intended for simultaneous assertion which might provide duplicative recovery and causes of action which contain elements which are necessarily mutually exclusive of one another. Many other alternative causes of action exist, including some pending in current lawsuits we, and possibly you, are defending. Watching for and actively opposing these causes of action will help to stop this alarming new West Virginia trend and will help to prevent plaintiff's attorneys from double-dipping.