

COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT
S.J.C. No. 10546

COMMONWEALTH OF MASSACHUSETTS, Petitioner-Appellee

v.

LIFE CARE CENTERS OF AMERICA, INC., Respondent-Appellant

ON DIRECT APPELLATE REVIEW
FROM A REPORT OF QUESTIONS OF LAW
FROM THE MIDDLESEX SUPERIOR COURT

**AMICI CURIAE BRIEF
OF MASSACHUSETTS SENIOR CARE ASSOCIATION
AND AMERICAN HEALTH CARE ASSOCIATION
IN SUPPORT OF RESPONDENT-APPELLANT**

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INTEREST OF AMICI

Massachusetts Senior Care Association ("MSCA") and the American Health Care Association ("AHCA") (collectively, "*Amici*") represent the interests and perspectives of professional administrators and providers of long-term health care at both the state and national levels. These administrators and providers serve the most vulnerable segment of our country's population - the frail, elderly and disabled individuals who no longer can be cared for safely at home or who need short-term rehabilitation after a hospitalization. This elderly and disabled constituency represents the fastest-growing segment of the population. As such, long-term care providers are major employers, even during tough economic times, and provide significant professional advancement for a diverse workforce.

Amici support the brief filed by Life Care Centers of America, Inc. ("Life Care") because they are concerned about the potential negative impact that the Commonwealth's "novel" theory of criminal liability is likely to have going forward. Specifically, they are concerned about the potential

impact on their members as employers, on the vulnerable patients they serve, on the quality of care delivered, and on the existing system of federal and state administrative, civil and regulatory regimes in which they function.

Massachusetts Senior Care Association

MSCA is a member-organization that represents nursing facilities and other organizations that provide health and related social care for older adults and people with disabilities. In keeping with its mission to ensure the highest quality of care for nursing facility residents, MSCA and its member-providers work to recruit, retain and support the highest quality caregiving workforce.

MSCA is the Commonwealth's largest long-term care organization, representing over 500 nursing and assisted living facilities. Over 85,000 Massachusetts citizens are employed by long-term care facilities, two thirds of whom provide direct "hands on" care to residents as Certified Nursing Assistants, Registered Nurses, Licensed Practical Nurses and Therapists - making MSCA's membership the state's second largest health care employer.

Moreover, the patients of MSCA member-facilities are among the most needy Massachusetts residents. MSCA members serve more than 130,000 people every year, including elders and people with disabilities who cannot be safely cared for at home. The typical nursing facility resident is female, age 86, widowed and lived alone prior to entering a nursing facility. She is totally dependent on assistance with activities of daily living, such as bathing, dressing, toileting, dining and transferring. On average, each day she receives 24-hour supervision and 3.7 hours of direct nursing care.

American Health Care Association

AHCA is a non-profit federation of affiliated state health organizations such as MSCA, together representing more than 10,000 non-profit and for-profit assisted living, nursing facility, developmentally disabled, and sub-acute care providers that care for more than 1.5 million elderly and disabled individuals nationally. AHCA represents the long-term care community to government, business leaders, and the general public. It also serves as a force for change within the long-term care field, providing advocacy, information, education, and

administrative tools that enhance quality at every level.

AHCA focuses on providing quality care to the nation's frail, elderly and disabled, who are served by the long-term care professionals employed by its members. These members believe that the individuals they serve are entitled to a supportive environment in which professional and compassionate care is delivered. This belief compels AHCA, its affiliates and member-providers to advocate for individuals who, because of social needs, disability, trauma or illness, require services provided in a long-term care setting, while also advocating for the continuing vitality of the long-term care provider community.

AHCA believes its interests necessitate its commitment to developing reasonable public policies that balance economic and regulatory principles to support quality care and quality of life. AHCA is dedicated to professionalism and ethical behavior among all who provide long-term care.

STATEMENT OF THE ISSUE

Amici incorporate and rely upon the "Issues Presented by Rule 34 Report," "Statement of the Case" and "Statement of Facts" presented in the Brief of

Appellant Life Care Centers of America, Inc. filed in this Court on November 9, 2009, at pp. 1-11. The issues of law to be considered in this case are:

1. May a corporation be found guilty of involuntary manslaughter under Massachusetts General Laws chapter 265 section 13 based upon a theory of collective knowledge and conduct of multiple employees, in the absence of one specific employee who is criminally liable for the commission of that crime?
2. May a corporation be found guilty of neglect of a resident of its long-term care facility under Massachusetts General Laws chapter 265 section 38 based upon a theory of collective knowledge and conduct of multiple employees, in the absence of one specific employee who is criminally liable for the commission of that crime?

SUMMARY OF ARGUMENT

This case of first impression has the potential to profoundly influence the professional effectiveness, efficiency and business of providing quality health care in Massachusetts. Life Care, which provides sub-acute, rehabilitation, long and short-term care services, largely to elderly and

disabled patients, and operates skilled nursing facilities throughout the United States, has been indicted by the Commonwealth for involuntary manslaughter and elder neglect or abuse, and is being prosecuted primarily on the novel theory of collective knowledge.

The Superior Court reported the case - pre-trial - to the Appeals Court for a determination of whether a corporation may be held criminally liable based on aggregating the knowledge of multiple employees, none of whom had the requisite statutory intent to be charged individually and none of whose conduct exceeded mere negligence. Ultimately, the primary question is whether a corporation can be guilty of a crime where no individual employee engaged in criminal conduct. This theory is distinct from the traditional theory of corporate criminal liability, analogous to the legal theory of *respondeat superior*, which is predicated on the alleged criminally responsible conduct of a single individual employed by the corporation. The collective knowledge theory raises a novel question of law, which has the potential to radically alter the landscape of Massachusetts jurisprudence.

Amici believe that the current range of penalties and sanctions is adequate to address the issue of corporate liability as pertaining to health care providers. *Amici* also understand, accept and support the role of the Attorney General to regulate, monitor, and protect the quality of health care delivery, especially to vulnerable citizens, both administratively, civilly and, when appropriate, with criminal prosecutions. Allowing the Commonwealth to aggregate administrative and other errors which in themselves are not criminal, however, would have sweeping implications that would profoundly and adversely affect the business, management, provision and regulation of health care.

Furthermore, if allowed here, application of a collective knowledge theory would not be limited to health care. As noted by Superior Court Justice Connors, a criminal conviction may, in and of itself, prevent a corporation from qualifying for government contracts. Specifically, Justice Connors noted that "while this may look from the outside like a \$1,000 fine, it's debarment death sentence." Appendix at 127. Indeed, if accepted by the Supreme Judicial Court, this theory will rewrite the rules in this

Commonwealth for criminal law enforcement and prosecution against corporations, exposing them to unpredictable criminal liability by conflating separate instances of non-criminal negligence into criminal conduct.

ARGUMENT

This case arises out of the accidental death in 2004 of a longtime resident of the Life Care facility in Acton, Massachusetts, when an elderly wheelchair-bound resident negotiated two sets of double doors, exited the facility, and died going down the front stairs. The resident moved to Life Care's Acton facility from a non-Life Care facility in Ohio, where she had been diagnosed with depression, seizure disorders, alcohol abuse, partial left-side paralysis due to intracranial bleeding, and high blood pressure. During the more than seven years that the resident lived at Life Care Acton, her medical condition improved markedly. Although she required the use of a wheelchair and wore a WanderGuard bracelet, she was able to navigate the facility freely, which provided her with independence.

On these facts, the Massachusetts Department of Health issued a G-level violation to the Life Care

facility, which indicates a finding that this was an isolated deficiency that constituted actual harm, though not immediate jeopardy.¹ Life Care immediately conducted an investigation of its internal procedures, and implemented several remedial measures, including: (1) revising treatment sheets; (2) increasing nurse management monitoring of nursing documentation; (3) increasing training regarding WanderGuard placement and documentation; (4) placing a WanderGuard list at all nursing stations; and (5) increasing maintenance checks of the WanderGuard system. In addition, Life Care paid \$4,550 in fines. Significantly, Life Care cleared the deficiency the first time it was raised.

In addition, the Attorney General initiated criminal proceedings. However, the Commonwealth did not indict any individual nurse or employee, but instead proceeded against Life Care principally on a theory of corporate collective knowledge. Indeed, the Commonwealth seeks to aggregate the acts of twenty-two separate employees, over a period of four months, in order to arrive at a "corporate" criminal *mens rea*, without having to show that any individual agent met

¹ See Section II, *infra*, for a more detailed discussion of a G-level violation.

the standard for criminal conduct. The Commonwealth has acknowledged to the Superior Court that this is a novel theory of criminal liability. It also implicates core notions of criminal due process.

I. ADOPTING THE COLLECTIVE KNOWLEDGE THEORY WOULD RESULT IN A DRAMATIC SHIFT IN EXISTING MASSACHUSETTS LAW WITH FAR-REACHING IMPLICATIONS.

A prosecution on the theory of collective knowledge liability allows a corporation to be found criminally liable by aggregating the non-criminal conduct of multiple employees, each of whom is responsible for no more than negligence and none of whom had the requisite intent to support a charge against him or her individually. Massachusetts courts have acknowledged the far-reaching implications of the adoption of such a theory to criminal legal jurisprudence and beyond, and no appellate court here has ever accepted a theory of collective knowledge as a basis for corporate criminal liability.

A. Massachusetts common law does not support the adoption of a collective knowledge theory.

As recently as 2006, the Supreme Judicial Court reaffirmed that the only recognized basis for corporate criminal liability in Massachusetts requires "that an individual commit[] a criminal offense."

