

**IMPOUNDED CASE
COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

HAMPDEN, SS.

SJC NO. 13335

APPEALS COURT NOS. 2022-P-0309, 2022-P-0321

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

v.

DAVID CLINTON AND BENNETT WALSH,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

**BRIEF OF *AMICI CURIAE* LONG TERM CARE COMMUNITY COALITION,
DIGNITY ALLIANCE MASSACHUSETTS, AND DISABILITY POLICY
CONSORTIUM IN SUPPORT OF APPELLANT**

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STATEMENT OF INTEREST

The Long Term Care Community Coalition (LTCCC) is a non-partisan, nonprofit organization dedicated to improving quality of care, quality of life, and dignity for elderly and disabled persons in nursing homes, assisted living, and other residential settings. For over 30 years, LTCCC's work has focused on the legal and regulatory standards for nursing home care, their implementation by nursing home operators, and their enforcement by government regulatory agencies and via our judicial system. In addition to our policy and regulatory work, LTCCC provides a broad range of information and resources to the public on nursing home quality, resident rights, and other standards of care. LTCCC is interested in this case because of its profound concerns for the safety and welfare of vulnerable nursing home residents, for whom the responsibilities of facility administration are essential.

Dignity Alliance Massachusetts (DignityMA) is a statewide, non-profit organization dedicated to transformative change to ensure the dignity and rights of older adults, people with disabilities, and their caregivers. DignityMA is committed to advancing new ways of providing long-term services, support, living options, and care, while respecting choice and self-determination. DignityMA pursues its mission through education, legislation, regulatory reform, and legal strategies.

The Disability Policy Consortium is a statewide disability led public policy, legislative advocacy, and research organization dedicated to improving the quality of life for all people with disabilities in Massachusetts. Priority areas include healthcare, housing, antiracism, and economic equity.

Amici are organizations that represent the interests of older adults and nursing facility residents. The focus of this brief is on the following two issues raised by the appeal: (1) The duties

and responsibilities of a nursing home's administrator and medical director, and (2) Whether the actions of a nursing homes' leadership and staff had a significant impact on the likelihood that residents would fall victim to COVID-19.

SUMMARY OF ARGUMENT

The important responsibilities of nursing facility administrators have been defined in the federal code for over 30 years. The section of the code dedicated to Administration explicitly states that, "[a] facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."¹ Likewise, the duties of, and requirements for, a nursing home medical director are laid out in the federal code, which explicitly states that "the medical director is responsible for - (i) Implementation of resident care policies; and (ii) The coordination of medical care in the facility."²

As set forth in the facts of this case, residents suffered substantial negative consequences, including avoidable suffering and death, because of the superintendent's (administrator's) decisions. Specifically, staff, acting under the directive of the superintendent and the medical director, physically merged vulnerable residents with and without indications of COVID-19 infections into a single congregated space. This directive conflicts with longstanding infection control standards and protocols, including professional standards of care and federal requirements for infection protection and control in nursing homes.

¹ 42 C.F.R. § 483.70.

² 42 C.F.R. § 483.70(h).

ARGUMENT

I. The Superior Court erred in its construction of “caretaker” under G.L. c. 265 § 13K(a) by excluding administrators.

The Superior Court erred in its construction of “caretaker” by excluding administrators on the ground that they do not generally interact directly with residents. This conflicts with the plain meaning of the statutory language, which defines a caretaker as one whose responsibilities to an elder or person with disabilities can “arise as the result of a family relationship, or by a fiduciary duty imposed by law, or by a voluntary or contractual duty undertaken on behalf of such elder or person with a disability.”³ As noted above, longstanding federal rules explicitly require that a nursing home “must be administered in a manner that enables it to... attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.”⁴ Courts have found that a nursing home administrator’s license is one to “provide health care,” and although an administrator may not frequently interact directly with residents, they are inseparable from the caretaking continuum and duty to “provide health care” to residents in their facility.⁵ Moreover, a nursing home administrator has a specific obligation to ensure that all residents are free from abuse or neglect.⁶ In its recent landmark report on nursing home care, the National Academies of Science, Engineering, and Mathematics stated that “[a] nursing home administrator has oversight and operational responsibilities, including ensuring regulatory compliance [with standards of care], supporting the rights of residents, and maintaining financial accountability.”⁷

³ G. L. c. 265, § 13K.

⁴ 42 C.F.R. § 483.70.

⁵ *Crews v. Shalala*, 40 F. Supp. 2d 350 (E.D. Va. 1999).

⁶ 42 C.F.R. § 483.12.

⁷ National Academies of Sciences, Engineering, and Medicine. 2022. *The National Imperative to Improve Nursing Home Quality: Honoring Our Commitment to Residents, Families, and Staff*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/26526>.

The medical director at the Soldiers' Home was, likewise, subject to professional standards as a caretaker under federal and state law. Under 42 C.F.R. § 483.70(h), a medical director is responsible for: "(i) Implementation of resident care policies; and (ii) The coordination of medical care in the facility."⁸ In Massachusetts, under the standards for long-term care facilities, "Direct Care Worker" means a staff member whose work involves extensive resident contact *or* administrative decisions regarding their care.⁹ "Direct Care Worker" is defined to include, "but not be limited to... the medical director."¹⁰ These government requirements are well known and widely recognized. For example, a journal article on the role of a nursing home medical director explicitly states that

[t]he medical director is an important member of the healthcare team in a nursing home, and is responsible for overall coordination of care and for implementation of policies related to care of the residents in a nursing home. The residents in nursing homes are frail, medically complex, and have multiple disabilities. The medical director has an important leadership role in assisting nursing home administration in providing quality care that is consistent with current standards of care.¹¹

As the law and professional standards dictate, it is indisputable that the medical director had an important caretaker role at the Soldiers' Home.

⁸ 42 C.F.R. § 483.70(h).

⁹ 105 CMR 150.00.

¹⁰ *Id.*

¹¹ Nanda A. The Roles and Functions of Medical Directors in Nursing Homes. *R I Med J* (2013). 2015 Mar 3;98(3):20-2. PMID: 26056830.

Nursing facility administrators and medical directors are subject to longstanding professional standards under both federal and state law.^{12 13} Under these rules, the superintendent (administrator) and medical director both had substantive duties to oversee the health care, safety, and conditions for every resident at the Soldiers' Home. Their decision to consolidate two floors of vulnerable veterans with dementia, some COVID-19 positive and others asymptomatic, into a single floor, had a significant and foreseeable likelihood of leading to more COVID-19 cases and the death of many residents.

Any conclusion that the superintendent and medical director, who were acting at the top of the facility's chain of command, were *not* caretakers with a duty to "provide health care" in a safe manner would be contrary to clearly established state and federal law and regulation, federal guidance, and professional standards.¹⁴ It would also establish a dangerous precedent. A nursing home administrator's actions and competence directly impacts the care and quality of life for residents in their facility. The administrator is responsible for the "overall implementation" of facility policies and procedures.¹⁵

Federal guidance for nursing home surveyors (inspectors) cites to the role and/or responsibilities of a nursing home administrator 97 times.¹⁶ Importantly, in respect to the present case, the guidance explicitly states that: "The facility administration and medical director should ensure that current standards of practice based on recognized guidelines are incorporated in the

¹² H.R.1985 – 117th Congress (2021-2022): Nursing Home Reform Modernization Act of 2021, H.R.1985, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1985>.

¹³ Mass. Gen. Laws Ann. Ch. 112, § 116 (West).

¹⁴ *Id.*

¹⁵ *See*, for example, Crnich, Christopher, "Reimagining Infection Control in U.S. Nursing Homes in the Era of COVID-19," JAMDA, Volume 23, ISSUE 12, P1909-1915, December 01, 2022, which states that "it is critically important for the NH [nursing home] to have an infection control committee that meets regularly.... **At a minimum, the facility infection control committee should include key members of the facility leadership, including the administrator, director of nursing, and medical director.** [Emphasis added.]

¹⁶ CMS State Operations Manual Appendix PP – Guidance to Surveyors for Long Term Care Facilities (2022).

resident care policies and procedures.”¹⁷ In addition to these longstanding federal requirements, under the state rules in Massachusetts, an administrator supervises or is in general administrative charge of a nursing home.¹⁸ In light of the affirmative duties imposed on administrators, “and the important social policy behind these duties of protecting the health and safety of the patients who have surrendered themselves to the custodial care of the nursing home,” this Court should directly review the Superior Court’s interpretation of “caretaker” that improperly excluded the administrator (superintendent) and the medical director.¹⁹

II. The increased rate of transmission and death toll associated with COVID-19 was not inevitable at the Soldiers’ Home.

Nursing homes have been required to establish and implement comprehensive infection control measures for over three decades, long before the onset of COVID-19. This includes having a “system for preventing, identifying, reporting, investigating, and controlling infections and communicable diseases for all residents, staff, volunteers, [and] visitors... [with] [w]ritten standards, policies, and procedures....”²⁰

The ability to effectively implement those measures depends, essentially, on two factors: (1) effective oversight and administration of the care and services provided to residents and (2) the availability and competency of the nursing staff working under, and in accordance with, the facility’s leadership. The superintendent at the Soldiers’ Home concedes to short staffing in the facility during the pandemic. However, dangerous short staffing preexisted COVID-19 at the Soldiers’ Home.²¹ In fact, the Massachusetts Office of the Inspector General found extensive

¹⁷ *Id.*

¹⁸ Mass. Gen. Laws Ann. ch. 112, § 108 (West).

¹⁹ *Smoyer v. Care One, LLC*, No. 2:16-CV-1696, 2017 WL 575070 (W.D. Pa. Jan. 23, 2017), report and recommendation adopted, No. 2:16-CV-1696, 2017 WL 573573 (W.D. Pa. Feb. 13, 2017).

²⁰ 42 C.F.R. § 483.80(a).

²¹ Commw. of Mass. Office of the Insp. Gen., *Holyoke Soldiers’ Home, May 2016 to February 2020* (2022).

evidence that “Superintendent Walsh failed to manage the Home’s staffing issues effectively.”²² His persistent failure to address the staffing issue put residents at risk every day and exacerbated the dangers to which they were exposed by the COVID-19 pandemic.

Decades of studies have consistently found that more nurses mean better care and safety for nursing home residents. This is especially true when there is a crisis, such as that brought on by the COVID-19 pandemic. A cross-sectional analysis on Connecticut nursing homes found that higher RN staffing and quality ratings have the potential to better control the spread of COVID-19 and reduce deaths.²³ Based on these findings, among facilities with at least one death, “every 20-minute increase in RN staffing of the nursing home significantly predicted a 26% reduction in COVID-19 deaths.”²⁴ This suggests that a lower death rate from COVID-19 was achievable at the Soldiers’ Home. As noted above, knowledge of the short staffing issue at the Soldiers’ Home preexisted COVID-19. Had short staffing been remediated rather than encouraged through a merger, fewer deaths most likely would have occurred.

By comparison, nearly ten months after the merger at Soldiers’ Home, a nursing home that “caters mostly to low-income people of color, who as a group have been hit disproportionately hard by the disease” reported zero cases of COVID-19 at their facility (Maryland Baptist Aged Home).²⁵ Their administrator did not implement a merger as a response to short staffing; they recruited *additional* staff and implemented screening for the employees who would have contact with the residents. This facility showed that an outbreak of COVID-19 was not inevitable in a nursing home setting. The Soldiers’ Home was a larger facility, and at

²² *Id.* at p. 12.

²³ Li, Y., Temkin-Greener, H., Shan, G. and Cai, X. (2020), *COVID-19 Infections and Deaths among Connecticut Nursing Home Residents: Facility Correlates*. *J Am Geriatr Soc*, 68: 1899-1906.

²⁴ *Id.*

²⁵ Cerullo, Megan, “How one nursing home warded off the coronavirus and saved lives, January 22, 2021. Available at <https://www.cbsnews.com/news/baltimore-nursing-home-covid-free/>.

one point it was also reported their staff, “managed an account of donations of over one million dollars... and its Board of Trustees (Board) considered these donations to be Board funds.”²⁶ Allocating more resources into staffing recruitment efforts and resident care, rather than a merger, may have mitigated the COVID-19 outbreak at the Soldiers’ Home and prevented the death(s) of vulnerable residents.

CONCLUSION

For the reasons stated above, we respectfully request this Court allow for direct appellate review of the Superior Court’s decision.

Respectfully submitted,

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²⁶ Commw. of Mass. Office of the Insp. Gen., *Holyoke Soldiers’ Home, May 2016 to February 2020* (2022).

CERTIFICATE OF SERVICE

I, Judith M. Flynn, hereby certify that I today caused the foregoing Brief of *Amici Curiae* Long Term Care Community Coalition, Dignity Alliance Massachusetts, and Disability Policy Consortium to be served, via the Court's electronic filing system, upon the following attorneys of record in this matter:

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