

**MARGOLIS
EDELSTEIN**

SCAMPONE V. HIGHLAND PARK

Not Such Bad News for Nursing Home Management Companies

MILES A. KIRSHNER

HARRISBURG OFFICE
3510 Trindle Road
Camp Hill, PA 17011
717-975-8114

PITTSBURGH OFFICE
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-281-4256

WESTERN PA OFFICE
983 Third Street
Beaver, PA 15009
724-774-6000

SCRANTON OFFICE
220 Penn Avenue
Suite 305
Scranton, PA 18503
570-342-4231

**MARGOLIS
EDELSTEIN**

**Miles A. Kirshner, Esquire
525 William Penn Place
Suite 3300
Pittsburgh, PA 15219
412-355-4962**

FAX 412-642-2380
mkirshner@margolisedelstein.com

CENTRAL PA OFFICE
P.O. Box 628
Hollidaysburg, PA 16648
814-695-5064

SOUTH NEW JERSEY OFFICE
100 Century Parkway
Suite 200
Mount Laurel, NJ 08054
856-727-6000

NORTH NEW JERSEY OFFICE
Connell Corporate Center
400 Connell Drive
Suite 5400
Berkeley Heights, NJ 07922
908-790-1401

DELAWARE OFFICE
750 Shipyard Drive
Suite 102
Wilmington, DE 19801
302-888-1112

Scampone v. Highland Park

Not Such Bad News For Nursing Home Management Companies

On November 21, 2012, six unanimous justices issued their Opinion in *Scampone v. Highland Park*. The Supreme Court of Pennsylvania accepted allocatur, in order to determine whether liability for the judicially created tort of corporate negligence may fairly be extended to nursing homes and nursing home management companies. The Court refused to preclude the application of this legal theory, ruling instead that the liability of defendants in nursing home negligence litigation is to be determined by conducting an analysis respecting the presence or absence of a legally recognized duty. The Court did not make final disposition of the case before it, but remanded to the trial court for a determination respecting the duty of the named defendants to the victim of alleged nursing home negligence.

Scampone is being viewed as problematic for Pennsylvania's nursing home industry in particular, and also for all proponents of tort reform. Legally, the Court disagreed with the defendants' attempt to distinguish nursing homes from hospitals, and concluded that the factors that give rise to liability for corporate negligence could be present in the nursing home setting. On the broader issue of tort reform, the Court spoke volumes when it declined to consider factors relating to the economic impact of extending application of corporate negligence to this industry.

When the Supreme Court accepted allocatur, it agreed to consider not only the extension of corporate liability to the long term skilled nursing facility itself but also to management companies which provide services in this industry. Nursing home management companies typically provide services to individual facilities in three categories. A management company can provide a full array of financial services. It provides consulting services where specialists in all the different areas of nursing home operations (e.g. nursing, dietary and housekeeping) visit the facility on a regular basis to help its providers improve performance. Finally, a nursing home management company will typically provide the facility with its certified Nursing Home Administrator.

Just as important for our discussion, however, is what a nursing home management company does not do. It has no contractual relationship with individual residents. It provides no medical or nursing care. In most cases, direct resident care is provided solely by employees of the facility. An individual resident contracts with the facility, and probably does not even know that there is a management company in place.

While the Supreme Court did refuse to preclude application of corporate negligence in the nursing home industry, it did not go to the extent of imposing such liability on the defendants in the case before it. Recognizing that all negligence actions require the presence of a duty, *Scampone* has been remanded to the Court of Common Pleas of Allegheny County for a determination of whether these defendants owe a duty to this plaintiff.

The Court provided guidance as to how a trial court should go about determining the presence or absence of a duty. The heart of the Chief Justice's Opinion instructs that a court determining the

presence or absence of a legal duty owed by nursing homes or management companies should conduct the same duty analysis that is applied in every other negligence case. Citing *Althaus v. Cohen*, 756 A.2d 1166, 1169, the Court noted "to determine whether a defendant owes a plaintiff a duty of care, this Court must consider several factors: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution."

While this article does not speak to the question of whether a nursing home will owe a duty under the *Althaus* factors, it does suggest that the *Scampone* opinion does not necessarily imply that a duty will be found to exist between those in the nursing home management industry and individual nursing home residents. This article contends that a management company that properly defines the scope of its relationship with a facility should have no duty to individual residents in nursing malpractice actions. Summary judgment should be available to these defendants not despite, but because of *Scampone*.

This issue was raised in *Balog v. Rolling Meadows*, et al A.D. No. 422, 2005 (CCP Greene Co.). *Balog*, like *Scampone*, arose from a claim of nursing home neglect leading to the creation and worsening of decubitus ulcers. Plaintiff brought general nursing negligence and corporate negligence claims against both the nursing home and its management company. The management company filed a motion for summary judgment, noting that its relationship was with the facility, and not with any individual resident. The record demonstrated that the services provided by the management company were administrative or consultive, but were not clinical or medical.

Writing fully five years before the Supreme Court would formally endorse this standard, President Judge Nalitz in Greene County applied the very same *Althaus* factors to the management company's motion for summary judgment. The Court granted this motion, expressly citing the *Althaus* factors. The Court held:

We next consider whether [management company] CHR-Eastern had a duty to residents at Rolling Meadows. There was no relationship between CHR-Eastern and Mr. Balog. CHR-Eastern provided no care to Mr. Balog. Frank Balog came to Rolling Meadows and entered into a contract with that entity, and with no other entity. He was cared for by Rolling Meadows personnel and if he was neglected or mistreated as his estate claims he was, it was by Rolling Meadows personnel. Mr. Balog did not enter Rolling Meadows with any expectation of care by CHR-Eastern nor does the record show that either he or his family ever knew that CHR-Eastern existed.¹

The business setting at the nursing home in issue in *Balog* is typical of that which is in place in a majority of long term skilled nursing facilities in Pennsylvania. Individual facilities can take advantage

¹The entry of summary judgment in favor of the nursing home management company was affirmed by the Superior Court via unpublished Memorandum. No. 1613 WDA 2007 (June 1, 2009).

of the economies of scale by seeking the kind of financial, consultative and administrative expertise that a management company can provide. The providing of these services by the management company to the facility, however, does not necessarily infer the establishment of any relationship with, or duty to individual residents. A properly drafted management services agreement should clearly define what the management company does, and should just as clearly specify that it does not provide medical care nor any direct care to individual residents. As confirmed in *Balog*, the duties which the management company owes are to the facility.

While there is no doubt that *Scampone* will make the assertion of general negligence and corporate negligence claims against nursing homes more likely, there is authority for the proposition that the defense of a nursing home management company remains viable as a matter of law. The providers of services in this industry can continue to carry on their business in Pennsylvania. While *Scampone* does allow a court to contemplate the extension of corporate negligence, there is an argument that it is not such bad news for the nursing home management industry.

December 13, 2012



Mr. Kirshner² has over 25 years of extensive civil trial experience, having tried over one hundred fifty civil jury and non-jury trials to verdict. Mr. Kirshner was admitted to practice in the state courts of Pennsylvania and West Virginia, the federal courts in the Western and Middle Districts of Pennsylvania, the Northern District of West Virginia, the United States Court of Appeals for the Third Circuit, and the United States Supreme Court. In 2004, he was elected as a fellow in the Academy of Trial Lawyers of Allegheny County

²The author represented management company CHR-Eastern in *Balog* and other nursing home negligence actions. Copies of the Opinions in that case are available by request.