

COA Opinion: Common-law indemnification requires a showing that the nursing home seeking indemnity was only passively negligent.

23. March 2011 By Jason Byrne

In *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, the Court of Appeals affirmed the trial court's denial of StarMed's motion for summary disposition and reversed the trial court's partial grant of summary disposition of Botsford common-law indemnification claim in its favor.

This action arises from an underlying professional negligence action against Botsford, where the jury awarded plaintiff Virginia Harris \$205,000 in noneconomic damages. Virginia Harris sued Botsford based on a hip fracture she sustained when she staying at Botsford's facility. While Harris was admitted to the nursing home, she had a colostomy bag that periodically needed emptying. Harris pressed the call button to get assistance with emptying the bag, and no one came. Harris's longtime companion Robert Hayes, age 81, then went out to the nursing station to ask for assistance. Allegedly the two nurses, who were StarMed employees, instructed him to help Harris to the bathroom and assist her with emptying the bag. The two nurses, however, testified that they informed Hayes to press the call button and a nurse's aide would respond. Hayes attempted to assist Harris to the restroom and Harris fell, fracturing her hip.

The complaint in the underlying action alleges that both the LPNs and the nurse's aides (who were Botsford's employees) were professionally negligent. The jury instructions, however, did not distinguish between the acts of the LPN and the nurse's aides, listing only one count of professional negligence.

Botsford filed the present action against StarMed seeking common-law indemnification, contractual indemnification, implied contractual indemnification, and contribution based on the adverse jury verdict. The trial court granted Botsford summary disposition based on its common-law indemnification claim stating that the two LPNs were the only licensed professionals whose care was at issue. The Court of Appeals reversed, concluding that there were genuine issues of material fact concerning whether the jury found Botsford or its employees to be actively negligent. It noted that the underlying complaint alleged both active and passive negligence and that the jury verdict did not differentiate between the two.

The Court remanded the case to trial court for the trier of fact to determine whether the jury in the underlying medical malpractice case considered and decided any claims of active negligence and whether the jury's verdict was based in any part on the active negligence of Botsford or Botsford's own employees.