

Denton County District Court
Week of 3/30/98.
362nd Judge David C. White
95-40847

Martha Fough, Representative of the Estate of Dorothy Cooper
vs. Texas Health Enterprises, Inc. HEA Management Group, Inc.

P-David T. Marks of
The Marks Firm, Houston;
David Hill of
Wellborn, Houston, Adkison, Mann, Sadler & Hill, L.L.P., Henderson;
Michael Whitten of
Griffen, Whitten & Jones, Denton

D-Russell Schell of Schell,
Beene, Vaughan & Quillin, Dallas

Negligence/Gross Negligence: The defendant, Texas Health Enterprises, Inc., (THE), is an entity wholly owned by Peter "Woody" Kern, which owns and operates 10 nursing homes throughout the state of Texas. Defendant HEA Management Group, Inc., also owned by Kern, is a management company which is responsible for the policies, procedures and management of the various nursing homes. Plaintiff Fough was the original executrix of the estate of Dorothy Cooper, later replaced by Elma Holder.

In 1991, Johnny Gordon, a six foot, 200 pound man with a criminal history and an outstanding health warrant for gonorrhea, applied to be a nurse's aide at a THE facility New Horizons, in Odessa. Under state law, the facility was required to request a criminal history, which it did, mistakenly classifying him as a female. Searched in state records as a female, the name came up clear of any record. He was hired. Three weeks later he was fired by Assistant Director of Nurses, Carol Medlock, for slapping an 87yearold female patient repeatedly.

After some period of time in Kansas, Gordon returned to Texas and in October, 1992, applied at another THE facility, Terrace West in Midland. The required criminal check was done, but from a handwritten form with what looked to be the name of Johnny Cordon. Searched as such in state records, the name came up clear of any record. He was hired. Instead of enrolling him in the required 80 hour nurse's aide training course, he was placed immediately in patient contact, despite a state law requiring that any nurse's aide not receiving certification within 120 days must be removed from patient contact.

Finally, in June, 1993, he was directed to attend the course at yet another sister facility, Terrace Gardens in Midland. (Terrace West had been disqualified and prohibited by the State from giving the course due to its record of bad practices.) As part of the course curriculum, the facility was required to do a criminal history check. They failed to do so. Assistant Director of Nurses Jolene Swanner testified that they routinely do not do the required check. During the course, a substitute trainer was needed and the chosen substitute was none other than Assistant Director of Nurses Carol Medlock who had previously fired him for patient abuse. She recognized Gordon and reported him to Assistant Director of Nurses, Sylvia Casas. Nothing was done.

Shortly after his certification, on July 20, 1993, Gordon was assigned to be on the shower team to give patients showers. Policy required a female to be present during all female patient showers. Policy was ignored.

Evidence from medical records indicates that Gordon had been sporadically sexually abusing a 65 year old stroke victim by the name of Dorothy Cooper who was significantly paralyzed as a result of the stroke and had threatened her with severe harm if she reported the sexual abuse. She was one of the patients Gordon was assigned to shower. While in the shower stall, Gordon brutally raped her twice with a shower head, then returned her to her bed. There he relieved himself sexually, spilling his fluids across her body.

It was this substance which alerted subsequent nurse's aides. They reported it to the charge nurse who dismissed it as the patient's own discharges. One of the aides, however, insistently reported the matter to the director and demanded that the police be called.

Gordon was fired, arrested, convicted and is serving a five year sentence.

Ms. Cooper was never given any postrap therapy.

The discharged Corporate Director for Personnel for HEA (later rehired) testified in deposition that since 1989 he had alerted management to the need to prevent hires by one THE facility of employees discharged from another. Although they had such a system in place to alert them of applicants with a history of worker's compensation claims, the company had refused to institute a similar procedure to prevent rehires of abusive employees on the grounds of budget constraints.

In a bifurcated trial, the jury found defendant Texas Health Enterprises, Inc. to have been grossly negligent and defendant HEA Management Group, Inc. to have been negligent.

Awarded:

\$2,750,000 actual damages for pain and suffering and mental anguish.
Just prior to trial on the punitive damages issue, the parties came to a settlement of \$1,900,000 punitive damages.
\$4,650,000 Total award and settlement.
10:2 (9 day trial)

Pretrial demand: \$4,000,000 policy limits
Asked of jury: Not specified
Pretrial offer: \$100,000

Sidelights:

- The 10:2 vote apparently came about only because two of the jurors insisted that defendant HEA should also have been found grossly negligent.
- The insurance company has agreed to pay \$3,700,000. The owner of both companies, Woody Kern, has agreed to pay the remainder.
- The settlement agreement included several requirements: 1) the companies are required to institute a system which will allow them to identify employees discharged from sister facilities; 2) they must make a good faith effort, by August 1, 1998, to comb through their files to identify persons already in the system who fall into that classification; and 3) an already named referee will monitor their progress, with a \$10,000 per month penalty for failure to comply.
- Although not required by the settlement agreement, it was strongly suggested that the crosscheck system be named "The Dorothy System" after Ms. Cooper who suffered so at the hands of Johnny Gordon.
- Attorney David T. Marks is a pioneer of nursing home reform and has been successful in litigation nursing home cases and has made a point of insisting that reforms be part and parcel of any settlement agreements that he negotiates.
- Ms. Cooper's husband had died before she entered the nursing home and she had no children. The heirs to her estate, therefore, are nieces and nephews. They have joined together in an agreement contributing a significant portion of the award to the National Citizens' Coalition for Nursing Home Reform based in Washington, D.C. Elma Holder is the Executive Director of that organization and that is the reason she was chosen to become the substitute executrix for the estate of Dorothy Cooper.