Joint Webinar Presentation

Writing for the Record: Litigation and Liability

Earn 1 CPEU

Presented by Kathy Warwick, RD, CDE and Michael Phillips, Esquire
Wednesday, September 20th, 2:00-3:00pm ET

The Birth of a Lawsuit

- Important to set realistic expectations
- Lack of end-of-life education
- Identifying and manage "difficult" family members
- Deal with unhappy "absent" family members
- Recognize events that may result in litigation
- Accept that we live in a litigious society

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"Profits over People"

Favorite Plaintiff Targets

Staffing, Abuse or Neglect
Fraudulent Charting
Skin Breakdown
Malnutrition and Dehydration
Infections
Falls and Contractures
Weight loss

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Stages of a Lawsuit

- Summons and Complaint
- Answer and Affirmative Defenses
- Written Discovery
- Depositions
- Settlement
- Negotiations
- Trial

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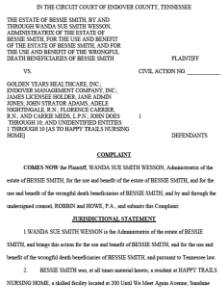
The Complaint



IN THE CIRCUIT COURT OF ENDOVER COUNTY, TENNESSEE

THE ESTATE OF BESSIE SMITH, BY AND THROUGH WANDA SUE SMITH WESSON, ADMINISTRATRIX OF THE ESTATE OF BESSIE SMITH, FOR THE USE AND BENEFIT OF THE ESTATE OF BESSIE SMITH, AND FOR THE USE AND BENEFIT OF THE WRONGFUL DEATH BENEFICIARIES OF BESSIE SMITH — PLAINTIFF

VS. — CIVIL ACTION NO. _____

GOLDEN YEARS HEALTHCARE, INC.; ENDOVER MANAGEMENT COMPANY, INC.; JAMES LICENSEE HOLDER; JANE ADMIN JONES; JOHN STRATOR ADAMS; ADELE NIGHTINGALE, R.N.; FLORENCE CARRIER, R.N.; AND CARRIE MEDS, L.P.N.; JOHN DOES 1 THROUGH 10; AND UNIDENTIFIED ENTITIES 1 THROUGH 10 (AS TO HAPPY TRAILS NURSING HOME) — DEFENDANTS

COMPLAINT

COMES NOW the Plaintiff, WANDA SUE SMITH WESSON, Administratrix of the estate of BESSIE SMITH, for the use and benefit of the estate of BESSIE SMITH, and for the use and benefit of the wrongful death beneficiaries of BESSIE SMITH, and by and through the undersigned counsel, ROBBIN and HOWE, P.A., and submits this Complaint:

JURISDICTIONAL STATEMENT

1. WANDA SUE SMITH WESSON is the Administratrix of the estate of BESSIE SMITH, and brings this action for the use and benefit of BESSIE SMITH, and for the use and benefit of the wrongful death beneficiaries of BESSIE SMITH, and pursuant to Tennessee law.

2. BESSIE SMITH was, at all times material hereto, a resident at HAPPY TRAILS NURSING HOME, a skilled facility located at 200 Until We Meet Again Avenue, Sunshine

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Negligence

Legal Definition of Negligence

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Elements of Negligence

- Duty
- Breach of Duty
- Proximate Causation
- Injury/Damages

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The "REPTILE BRAIN"

- The reptile brain is conditioned to favor safety and survival.
- The focus of the plaintiff's case is on the conduct of the defendant, not the injuries of the plaintiff.
- If plaintiff's' counsel can reach the reptilian portion of the jurors' brains, they can influence their decisions; jurors will instinctively choose to protect their families and community from danger through their verdict.

Litigation and Liability

- **"Standard of Care"-** What a reasonably competent provider would do in a similar situation with a similar patient.
- "**Guidelines"**- The set of recommended practices based on best evidence available. (not individualized)
- **"Regulations"** (OBRA)- Guidelines for survey but not individualized

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Guidelines

- Many professional associations, government agencies publish guidelines for patient care
- ASPEN, NPUAP, AMDA, etc.
- Facility Policy and Procedures, Protocols
- Accreditation standards- Joint Commission, etc.
- AND – Standards of Practice, Standards of Professional Practice, Code of Ethics
- Licensure – state specific practice provisions

www.Guidelines.gov

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The "Regs"

- 1. OBRA Regulation – 483.75 requires that:

  "The facility must maintain clinical records on each resident in accordance with accepted professional standards and practices that are complete, accurately documented, readily accessible and systematically organized."

- 2. OBRA Regulation – 483.25 (i)(1)(j) requires that:

  "The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health."

- 3. OBRA Regulation – 483.25 (i)(1)(j) requires that:

  Based on Resident's comprehensive assessment-

  "The facility must ensure that a resident maintains acceptable parameters of nutritional status such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible. AND

  Receives a therapeutic diet when there is a nutritional problem.

483.25 Quality of Care

- Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.
- **Intent:** The facility must ensure that the resident obtains optimal improvement or does not deteriorate within the limits of a resident's right to refuse treatment, and within the limits of recognized pathology and the normal aging process.
- 483.25- Tag F309 includes, but is not limited to, care such as end-of-life, diabetes, renal disease, fractures, congestive heart failure, non-pressure-related skin ulcer/wounds.

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COMPREHENSIVE PERSON-CENTERED CARE PLANNING (§ 483.21)
NEW SECTION*

- Baseline plan of care within 48 hours – person-centered care with instructions
- Adds a nurse aide and a member of the food and nutrition services staff to the required members of the interdisciplinary team that develops the comprehensive care plan.
- Must develop and implement a discharge planning process that focuses on the resident's discharge goals (End of Life planning?)

www.federalregister.gov/documents/2016/10/04/2016-23503/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities

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RDN's and Risk of Litigation

Assess your practice- What could go wrong?

- Sell supplements? Write tube feeding orders? Place feeding tubes?
- Bariatric surgery complications? End of life nutrition and hydration issues?
- Food service – food allergies and texture modifications
- Do you have extra training or certifications? Are you operating within the scope of your practice?

www.eatrightpro.org/resources/practice/quality-management/scope-of-practice

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Outcomes

- The law recognizes that bad things can happen despite good care and practitioners making all the right decisions.

Questions:

- Did the practitioner deviate from the accepted standard of care?
- If there was a deviation, did it cause or contribute to the bad outcome?

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Protecting Yourself

- EVIDENCE- BASED PRACTICE- up to date?
- Documentation- Accurate? Complete? Interdisciplinary? Refusals of care?
- Conversations with staff, family, patient
- Weights – wide variations? Weights done correctly? Document method of weighing?
- Assess and re-assess effectiveness of interventions
- Protocols to reduce delays in implementation

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Quality Improvement

- Identify potential issues and areas that need improvement
- Work with interdisciplinary team to correct errors or improve process
- Involve patients and family members and other stakeholders if needed
- Proactive instead of reactive!

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To Insure or Not to Insure?

- Facility policies may not cover individuals or Contractors
- Does it make you a target for a lawsuit?
- Even if cases settle or you decide to fight claims- Can take years and hundreds of thousands of dollars.
- If claim settles, facility may decide to sue you to recover cost of your perceived portion of the responsibility!

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Case Study: Wrongful Death

- Family claimed the resident was admitted for a "little rehab"
- Suit filed when the resident "unexpectedly died"
- Alleged poor wound care resulted in sepsis and wrongful death (even though death certificate attributed death to cancer and COPD)

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Does the Medicine Matter?

1. recent diagnosis of anal rectal cancer with chemotherapy and radiation – stage III indicating cancer had grown through the muscularis propria into the outermost layers of the colon
2. hospitalization for small bowel obstruction with surgical intervention
3. requiring total parenteral nutrition (TPN) (i.e. tube feeding) following bowel surgery due to inability to chew/swallow
4. ileostomy and terminal ileitis, inflammation of the ileum and adhesions from her small bowel disease
5. radiation enteritis, abdominal pain, nausea, vomiting and diarrhea
6. focal segmental glomerulosclerosis (FSGS) and chronic kidney disease, stage III
7. chronic obstructive pulmonary disease/emphysema from smoking
8. respiratory failure requiring ventilator support (atelectasis)
9. fifty year pack history of smoking
10. angina/chest pain

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Does the Medicine Matter?

11. arrhythmia or irregular heartbeat, atrial fibrillation
12. hypertension/high blood pressure
13. hyperlipidemia or elevated levels of bloods facts
14. anorexia/poor appetite with noted weight loss
15. significant deconditioning/muscle issues, atrophy
16. malnutrition and depressed blood protein levels
17. edema of lower extremities requiring the use of diuretics
18. poor urine output despite the administration of IV fluids (related to stage III kidney disease)
11. nodules in the liver and thyroid
12. peritoneal ascites

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Does the Medicine Matter?

21. atherosclerosis with noted calcifications in aorta and other blood vessels
22. pre-diabetes
23. DVT or blood clot to the left arm
24. elevated alkaline phosphatase
25. electrolyte abnormalities
26. paranoia and depression
27. anemia requiring blood transfusions
28. failure to thrive
29. broken skin areas to buttocks and surgical wound dehiscence
30. osteoporosis
31. hearing loss requiring hearing aids

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Medications

- IV antibiotics
- Flagyl
- Albuterol
- Atenolol
- Apresoline
- Calcitriol
- Cardizem
- Zafram
- Bentyl
- Enalapril
- Vitamin D
- Lovenox
- Simvastatin
- Digoxin
- Pulmicort
- Amiodarone
- Oxycodone
- Magnesium
- Protonix

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Case resolved in mediation

- Family was stunned to discover that prior to discharge from the hospital and admission to the nursing home, the treating physician documented his doubt that the patient would recover and that he believed hospice was more appropriate than placement for rehab.
- MD/nursing staff never communicated this assessment and recommendation to the family

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All Pressure Ulcers are Preventable?

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Avoidable vs. Unavoidable

- **Plaintiff's experts** - all wounds are avoidable
- **Defense experts** - almost all wounds are avoidable
- **Me** - almost all wounds are unavoidable

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Regulations

Based on the Comprehensive Assessment of a resident, the facility must ensure that

1. A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's *clinical condition* demonstrates that they were unavoidable
2. A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing

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Intent (F 314) 42 CFR 483.25(c)

The intent of this requirement is that the resident does not develop pressure ulcers unless clinically unavoidable and that the facility provides care and services to:

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Intent (F 314) 42 CFR 483.25(c)

- Promote the prevention of pressure ulcer development
- Promote the healing of pressure ulcers that are present (including prevention of infection to the extent possible)
- Prevent development of additional pressure ulcers

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Avoidable

Avoidable means that the resident developed a pressure ulcer and that the facility did **NOT** do **one or more** of the following:

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Avoidable

- Evaluate the resident's clinical condition and pressure ulcer risk factors
- Define and implement interventions that are consistent with resident needs, resident goals, and recognized standards of practice
- Monitor and evaluate the impact of the interventions
- Revise the interventions as appropriate

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Unavoidable

Unavoidable means that the resident developed a pressure ulcer **even though** the facility **had**:

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Unavoidable

- Evaluated the resident's clinical condition and pressure ulcer risk factors
- Defined and implemented interventions that are consistent with resident **needs**, **goals**, and recognized standards of practice
- Monitored and evaluated the impact of the interventions
- Revised the approaches as appropriate

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Skin Changes at Life's End- SCALE

The skin of a person who is approaching the end of their life often shows irreversible changes: the skin, like the heart or kidneys, is an organ which begins to fail. For a person who is within days or weeks of dying, skin changes such as pressure ulcers are often unavoidable, even with the best treatment.

IT MAY ALSO OCCUR WITH ACUTE OR CHRONIC ILLNESSES, AND IN THE CONTEXT OF MULTIPLE ORGAN FAILURE THAT IS NOT LIMITED TO THE END OF LIFE.

http://www.woundsresearch.com/content/scale-skin-changes-life%E2%80%99s-end

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The "Unavoidable" message has been received (somewhat)

- 10-15 years ago this concept was not available when defending pressure ulcer cases
- The concept of the skin being the body's largest organ was a foreign concept to jurors
- Plaintiff's expert's routinely testify (with a straight face) that all bed sores are preventable with "good care" or "sufficient staff" or "use of an air mattress" or "a proper diet" or "adequate protein and fluids"

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Is Wounding Predictable?

- End stage Dementia/Alzheimer's (surprise, most jurors are unaware this is a terminal condition)
- Terminal cancer
- Multiple hospitalizations
- End stage congestive heart failure
- Non-compliance
- Failure to thrive

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Terminal Dementia

- *Advanced dementia is associated with a life expectancy similar to that for more commonly recognized end-of-life conditions, such as metastatic breast cancer and stage IV congestive heart failure.*
- Choices, Attitudes, and Strategies for Care of Advanced Dementia at the End-of-Life (CASCADE) study, which prospectively followed 323 nursing home residents with this condition for 18 months. The median survival was 1.3 years. The most common clinical complications were eating problems (86% of patients), febrile episodes (53% of patients), and pneumonia (41% of patients).

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Terminal Dementia

- Tube feeding is NOT recommended. Does NOT prevent aspiration, wt. loss, pressure sores (in fact the rate of pressure sores was higher in those with a TF), infections or improve survival.
- Oral intake can be encouraged by means of conservative approaches, such as the presentation of smaller meals, altered food textures, and high-calorie supplements. A qualitative synthesis of the literature showed that of these approaches, only high-calorie supplementation was supported by moderate-strength evidence (e.g., evidence from randomized trials) to promote weight gain in patients with dementia; none of the approaches improved function or survival.

http://www.nejm.org/doi/full/10.1056/NEJMcp1412652#t=article

The Role of the RDN

- Accurate and complete assessments
- Evidence-based practice and recommendations consistent with guidelines BUT individualized to the specific resident
- Documentation of interdisciplinary, integrated, individualized care plan

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Credit Claiming

You must complete a brief evaluation of the program in order to obtain your certificate. The evaluation will be available for one year; you do not need to complete it on September 20, 2017.

Credit Claiming Instructions:

1. Log in to www.CE.TodaysDietitian.com and go to "My Courses" and click on the webinar title.
2. Click "Take Course" on the webinar description page.
3. Select "Start/Resume Course" to complete and submit the evaluation.
4. Download and print your certificate.

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