LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Horseplay In O.R.: Employee/Patient Has Right To Sue For Assault, Court Says.

A patient was admitted to the hospital for a tonsillectomy to be performed in the very same surgical department where he worked as a surgical tech.

As a joke, two of his co-workers, both registered nurses, painted his fingernails and toenails with pink nail polish, wrote "Barb was here" and "Kris was here" on each of his feet and wrapped his thumb with tape, while he was under anesthesia either right before or during the actual procedure.

Afterward the surgical tech sued the hospital and the co-workers involved in the incident for civil assault and intentional infliction of emotional distress.

The Court of Appeals of Texas ruled there were grounds for his lawsuit.

Assault in the Hospital
Is Not a Healthcare Liability Case

The Court rejected the argument that this was a healthcare malpractice case which required the patient to obtain expert testimony outlining a departure by the defendants from the standard of care or face dismissal of his lawsuit.

According to the Court, not every legal case which arises out of events in a health care setting is a health care liability case, even if the persons allegedly responsible were caregivers acting within the course of their employment in a healthcare facility when the events occurred.

The best analogy would be a sexual assault by a physician or other health care professional during the course of treatment. The professional standard of care for the treatment being rendered is not relevant and expert testimony is not needed for the victim to succeed in court.

Assault as the basis for a civil lawsuit is intentional physical contact which is known or reasonably should be known will be regarded by the victim as offensive or provocative.

The surgical tech alleged in his lawsuit that as a direct result of the intentional physical violation of his bodily integrity by his co-workers while he was unconscious he suffered humiliation and continued to feel extreme embarrassment afterward because of the negative impact that homophobic innuendo had on his work environment. **Drewery v. Adventist Health, __ S.W. 3d __, 2011 WL 1991763 (Tex. App., May 20, 2011).**

Arbitration: Patient Was Mentally Competent, Court Rules Arbitration Agreement Was Valid.

The seventy-four year-old patient had been living in an independent living facility where she fell and sustained an L1 vertebral fracture which required hospitalization followed by three weeks in the hospital's skilled nursing unit.

On admission to a nursing home from the skilled nursing unit there was concern she was suffering from a mental disorder even though she had never before been treated for mental illness.

An evaluation requested from a community mental health agency ruled out mental illness. Nursing notes referred to an ongoing urinary tract infection which seemed to account for the symptoms she was having.

On admission the patient signed an arbitration agreement along with thirty-seven other legal papers.

The patient claimed the arbitration agreement is unenforceable because she lacked the mental capacity to sign a contract when she signed it.

However, the mental status evaluation the facility requested when she was admitted indicates she did not suffer from major mental illness and that a more specialized placement was, therefore, unnecessary.

UNITED STATES DISTRICT COURT
KENTUCKY
June 20, 2011

Later the patient sued the nursing home for denial of treatment and improper care. The nursing home's first line of defense was to insist the court case be transferred to arbitration.

The US District Court for the Western District of Kentucky noted for the record an arbitration agreement is a contract and signed contracts are presumed valid. Convincing evidence is required to invalidate a signed contract.

The Court pointed directly to the admission mental health evaluation which was done not for legal protection but out of concern that the level of care available at the facility might not be adequate to meet the needs of an individual with mental illness. The evaluation disclosed no mental illness, mental impairment or cognitive deficit. **Abell v. Bardstown Medical, 2011 WL 2471210 (W.D. Ky., June 20, 2011).**

More legal Information for nurses is available at Legal Eagle Eye Newsletter for the Nursing Profession Home Page.