LEGAL EAGLE EYE NEWSLETTER

January 2017 *For the Nursing Profession* Volume 25 Number 1

Emergency Department: Court Faults Nurses, Did Not Invoke The Chain Of Command.

The mother brought her six year-old son to the emergency department with a fever, vomiting, diarrhea, congestion, coughing and a sore throat.

Vital signs obtained by the emergency department nurses included abnormally fast resting heart and breathing rates and a temp of 99.1°.

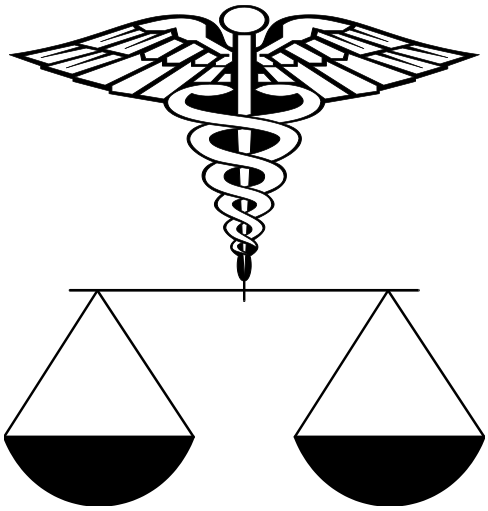
The child was vomiting in the emergency department. His throat was red. The blood test ordered by the physician showed an elevated white cell count and the chest x-ray revealed opacification in both lungs. His mother told the nurses he had a headache.

The emergency department physician diagnosed bacterial pneumonia and discharged the child with a prescription for an antibiotic and ibuprofen.

The child became unresponsive at home later that same day. His parents took him to a different hospital. At the hospital he began seizing. A CT showed abnormal intracranial signs. He was intubated and given IV fluids.

The child died in the hospital the next day from cerebellar tonsillar herniation due to brain swelling.

The Court of Appeals of Texas validated the parents' lawsuit against the first hospital based on a physician's expert opinion faulting the hospital's emergency nurses for failing to invoke the institutional chain of command.



The legal standard of care requires nurses in the emergency department to invoke the institutional chain of command to obtain an order to admit a patient whose signs and symptoms dictate that discharge is not appropriate.

Failing to do so can render the nurses and the hospital legally responsible for further harm suffered by the patient.

COURT OF APPEALS OF TEXAS
December 21, 2016

Invoking the chain of command is a hospital nurse's legal duty as the patient's advocate when the physician makes a treatment decision that threatens the patient's health or safety.

How to invoke the chain of command must be defined ahead of time by nursing management and nurses must be instructed what steps a nurse is expected to take.

As a rule a staff nurse must go to the charge nurse, the charge nurse to the unit manager, the unit manager to the house supervisor, the house supervisor to the physician in question, then up the physicians' hierarchy all the way to the top until appropriate action is taken.

Nurses' failure at any level in the chain to advocate for the patient can expose the institution to liability apart from the physician's malpractice.

In this case the parents' expert concluded the data obtained in the emergency department pointed to an immediate need for the child to be in a hospital ICU receiving aggressive attention from infectious disease specialists and critical-care nurses, before multi-organ failure made his death inevitable.

The expert held the nurses partly to blame for not taking action in the face of the physician's wrong decision. **Hinojosa, 2016 WL 7383819 (Tex. App., December 21, 2016).**

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Therapeutic Boundaries: Nurse Fired For Cause.

After being terminated from her job an LPN was denied unemployment benefits on the grounds she was fired for willful misconduct.

The nurse violated her employer's Therapeutic Boundaries Agreement by sharing with a client what she, the nurse, was going through with her own son who had been diagnosed with autism.

The nurse also violated a work rule pertaining to client grievances. Nurses were provided with client grievance forms to be given to any client who had a complaint about services rendered. Nurses were instructed to forward the forms received from clients immediately to the program director or clinical director.

Nevertheless the nurse was found to have such a form in her possession she received from one of her clients but never forwarded as she had been instructed.

Ironically the form in question was a client complaint that the client had become uncomfortable when the nurse discussed her own medications with the client and then went on about her own personal concern that her employer was planning to discharge her.

The employer's Therapeutic Boundaries Agreement is a legitimate work rule.

The facility properly required its nurses to minimize self-disclosure to the facility's clients.

The nurse had signed a copy of the agreement indicating she was aware of it.

COMMONWEALTH COURT OF PENNSYLVANIA
December 19, 2016

The nurse's disqualification from receiving unemployment benefits after her termination was upheld by the Commonwealth Court of Pennsylvania. The nurse intentionally violated two of her employer's legitimate work rules. **Tracey v. Board, 2016 WL 7335826 (Penna. Commwlth., December 19, 2016).**

Powdered Gloves: Now Banned By FDA.

The US Food and Drug Administration (FDA) has banned powdered surgeon's gloves, powdered patient examination gloves and absorbable powder for lubricating a surgeon's glove.

The ban takes effect January 18, 2017.

The FDA's December 19, 2016 announcement from the Federal Register is available on our website at http://www.nursinglaw.com/FDA121916.pdf

The short new regulation adding the gloves and powder to the list of banned devices is on the last page of the PDF document, Federal Register page 91731.

The FDA has been concerned about the risks to patients and healthcare workers from powdered gloves. Those risks include sensitization to natural rubber latex and surgical complications in the form of peritoneal adhesions.

The FDA's December 19, 2016 announcement from the Federal Register is available on our website at http://www.nursinglaw.com/FDA121916.pdf

The ban takes effect January 18, 2017.

The effective date of the ban applies to all of the designated gloves and powder already in commercial distribution or already sold to the ultimate user, as well as those that might be manufactured and distributed in the future.

FEDERAL REGISTER December 19, 2016
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The FDA announced it intention to issue this ban in March 2016. See *Powdered Gloves: FDA Proposes Ban.* Legal Eagle Eye Newsletter for the Nursing Profession (24)4, Apr. '16 p.8.

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Civil Monetary Penalties: Court Defines Period Of Noncompliance.

A skilled nursing facility was written up by state survey inspectors for violations of Medicare regulations.

A $6050 per day civil monetary penalty was assessed for three days for an immediate hazard presented by improper perineal care inspectors witnessed being given a resident by a direct-care worker.

An additional $350 per day penalty was applied after that until policies and procedures at the facility were brought in line with Medicare standards. Inspectors were concerned about the facility's processes for monitoring fall-prone individuals, staff training for Hoyer Lift transfers and nursing oversight of care-worker surveillance for skin integrity breakdown.

The Texas Department of Aging and Dependent Services cleared the facility's violations as of January 16, 2014.

However, it was not until February 18, 2014 that the US Centers for Medicare and Medicaid Services (CMS) certified that the facility had achieved substantial compliance with conditions of participation for a skilled nursing facility.

The $350 per day civil monetary penalty will still be assessed during the interval between those dates.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
December 15, 2016

The US Court of Appeals for the Fifth Circuit (Texas) ruled that the $350 per day penalty applied until CMS certified the facility as being in compliance. **West Texas v. US DHHS, __ F. 3d __, 2016 WL 7321295 (5th Cir., December 15, 2016).**

Mental Health: Court Refuses Arbitration.

The forty year-old patient was admitted to the nursing home after he tried to commit suicide by jumping off a highway overpass. He had a long history of schizophrenia and bipolar disorder.

This particular nursing home was selected because it held itself out as capable of caring for patients with high risk for elopement, care this patient sorely needed.

At the time of admission the patient signed an arbitration agreement.

A month into his stay the patient went out his window, wandered the neighborhood for a while and then returned and told a staff member what he had done. The staff member alerted other staff.

The next day he went out his window again. This time he went and jumped off a highway overpass and was badly injured.

His mother, who was appointed his legal guardian after he was admitted, sued the facility on his behalf for negligence in allowing him to elope while on notice he had the propensity and the means to do so.

The Court of Appeals of Texas ruled the arbitration agreement invalid and no bar to the suit. The patient lacked mental capacity when he signed it due to his history of schizophrenia and bipolar disorder. **Oak Crest v. Barba, 2016 WL 7046844 (Tex. App., December 1, 2016).**

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EMTALA: Court Dismisses Suit Against Nurse.

A patient sued the hospital and the nurse practitioner who saw her in the emergency department, claiming a violation of the US Emergency Medical Treatment and Active Labor Act (EMTALA).

The patient claimed she was denied the appropriate emergency medical screening examination that is every emergency patient's right in every US hospital emergency room.

The US District Court for the Eastern District of California saw three flaws in the patient's legal case.

The hospital's records showed she was in fact triaged by the nurse practitioner within forty minutes of arrival. Her wait was not the four hours she claimed in her lawsuit had elapsed before she was seen.

The nurse testified the patient got up and left the hospital right in the middle of her examination. According to the Court, that alone precluded the need for any further consideration of her legal case.

Nurses Are Not Subject To Suit Under the EMTALA

The third ground for dismissal of the patient's lawsuit against the nurse practitioner was that only physicians and hospitals, not nurses, can be held liable in a patient's civil suit under the EMTALA.

Nevertheless a hospital can be sued as an emergency department nurse's employer for what the nurse did or failed to do. A nurse can be sued for negligence in the emergency department, if that is an issue in the case. **Genthner v. Clovis, 2016 WL 7178600 (E.D. Cal., December 8, 2016).**

Labor & Delivery: Court Dismisses Nurse Midwives.

A lawsuit was filed on behalf of an infant born with brain injuries allegedly caused by an amniotic fluid embolism during his mother's labor.

Intrauterine oxygen deprivation was alleged as the medical cause.

Negligence by the nurse midwives who were present during the labor and responsible for fetal monitoring which had been ordered by the attending obstetrician was alleged as the legal cause of the infant's injury.

The nurse midwives were employees of a US government funded health clinic. The US District Court for the Eastern District of California dismissed their employer, the US government, from the case.

Common themes in legal cases involving hypoxic injuries during labor are the labor and delivery nurses not watching the monitor tracings, not understanding abnormal tracings they see or not reporting or waiting to report data about the labor to the ob/gyn the nurses know is abnormal.

However, for the patient to hold a labor and delivery nurse liable in one of these scenarios the patient must prove that the obstetrician would have gone ahead with a cesarean if the nurse had communicated accurate data in a timely fashion.

In this case the obstetrician testified she would not have ordered a cesarean even if the fetal heart rate drop in question had been reported to her. The Court ruled that made the nurse midwives' liability a moot question. **E.R. v. Sutter, 2016 WL 7229117 (E.D. Cal., December 13, 2016).**

Disability Discrimination: US Court Sees No Right To Non-Competitive Reassignment.

Due to spinal stenosis which had required surgery, a sixty-two year-old nurse who was morbidly obese was told by her physician that she had to use a cane.

However, on the psychiatric unit where she worked the cane was deemed a safety hazard, as it could be grabbed by a violent patient and used as a weapon.

The nurse was told she had to leave the psychiatric unit but could apply for other hospital positions posted as vacant. She interviewed for positions as educational specialist, home health clinician and care transition coordinator but was not hired as she had no relevant experience.

The nurse eventually found employment elsewhere doing telephone mental health triage, a position she admitted she finds satisfactory.

Nevertheless she sued her former employer for disability discrimination. The US Court of Appeals for the Eleventh Circuit (Florida) dismissed her case.

Nurse Was Disabled

The Court had no doubt the nurse was disabled. She had a significant impairment of the major life activity of being able to walk more than very short distances without the help of a cane. However, she was not a qualified individual with a disability on the psychiatric unit because her cane posed an unreasonable risk of harm.

No Right To Non-Competitive Reassignment

The nurse's case was taken up by the US Equal Employment Opportunity Commission (EEOC) which tried to set a legal precedent on behalf of disabled employees.

The EEOC's lawyers argued on the nurse's behalf that her right as a disabled person to reasonable accommodation included preferential treatment compared to other applicants for the same positions for which she applied who were more qualified than she and not disabled.

The Court rejected that argument and vindicated the current legal rule that a disabled employee wanting a position more compatible with a disability does not have precedence over other applicants. **EEOC v. St. Joseph's, __ F.3d __, 2016 WL 7131479 (11th Cir., December 7, 2016).**

The Americans With Disabilities Act (ADA) does not give a disabled employee the right to reassignment to a vacant position without competition from non-disabled applicants who are seeking the same position and may be more senior or more qualified.

The ADA gives disabled employees the right to reasonable accommodation.

One form of reasonable accommodation is reassignment to a vacant position.

However, it is not reasonable for the employer to have to reassign a disabled employee in preference to those not disabled.

The employer may use its existing policies to select among applicants who want a specific position.

The employer may use seniority as a legitimate basis for selecting a non-disabled individual over a disabled individual who is seeking a transfer as reasonable accommodation.

Or the employer may select a non-disabled over a disabled candidate on the basis of credentials like education and relevant work experience.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
December 7, 2016

Sexual Harassment: Employer Took Corrective Action.

The day after a nursing assistant reported that she was being sexually harassed by a male coworker, the coworker was transferred to a unit of the hospital on the floor above where she worked.

He was told to have no further contact with her unless it was necessary and kept within the bounds of professional conduct.

The nursing assistant later sued her employer for sexual harassment.

An employer must set up a process and inform employees of the process for making a complaint of sexual harassment.

Once such a complaint is received, or a supervisor otherwise finds out what is going on, the employer must take prompt and effective remedial action.

Prompt action starts within a day or two, and it must ultimately stop the harassment completely or it is not considered effective.

UNITED STATES DISTRICT COURT
ALABAMA
December 6, 2016

The US District Court for the Northern District of Alabama dismissed her case.

An employer is guilty of sexual harassment even when the perpetrator is not in a position of authority over the victim if the employer permits harassment to continue once the employer knows about it.

In this case the employer took action the very next day. Although the victim was not happy that the harasser confronted her the same day she reported him and she still saw him in the building, the Court was satisfied with the promptness and effectiveness of the employer's response. **Ike v. US, 2016 WL 7094707 (N.D. Ala., December 6, 2016).**

Anxiety, Depression: Court Dismisses Nurse's Disability Discrimination Lawsuit.

A charge nurse in the extended care unit at a VA medical center took a leave of absence from her job on her mental health provider's recommendation.

When it was time to return to work she informed her supervisors she had been diagnosed with an adjustment disorder with mixed anxiety and depressed mood.

Based on that diagnosis she requested transfer to another area of the facility. In connection with that request she indicated she was fully capable of working on just about any unit of the facility, except the extended care facility to which her mental health provider did not want her to return.

She was not offered another position. When she did not return after her medical leave had expired she was deemed absent without leave and was terminated.

Court Dismisses
Disability Discrimination Lawsuit

The US District Court for the Middle District of North Carolina dismissed the nurse's disability discrimination lawsuit.

There were multiple independent bases for the Court's ruling, each of which could have produced the same result.

No Proof Employee
Had a Disability

The Court accepted the fact the nurse had a legitimate diagnosis from her mental health provider of adjustment disorder with mixed anxiety and depressed mood.

However, the nurse failed to take the next required step of providing evidence that her condition fit the legal definition of a disability. Even when a genuine physical or mental condition can be substantiated, it is not presumed to be a disability under employment discrimination law.

A legal disability is a physical or mental impairment which substantially limits the individual in the performance of a major life activity like seeing, hearing, walking or working.

Applying for other positions on campus where she herself admitted she was fully capable of working strongly militated against the idea the nurse had a disability.

Even a legitimate physical inability to perform one particular job in one's field is not considered a disability for purposes of disability discrimination law.

In employment disability discrimination law the first question is whether the employee has a disability.

In discrimination law a disability can be one of three things:

A physical or mental impairment that substantially limits one or more major life activities;

A record of having such an impairment; or

Being regarded by superiors in the workplace as having such an impairment.

An employee with a disability is entitled to ask for and be granted reasonable accommodation from the employer.

Reasonable accommodation can include reassignment to a position where the disabled employee is better able to perform the essential functions.

However, even with a diagnosis of anxiety or depression, reasonable accommodation does not include the right to be transferred away from coworkers or supervisors with whom the employee is unable to get along or who cause prolonged stress or conflict.

A disabled employee has no special right to work in an aggravation-free or stress-free environment.

UNITED STATES DISTRICT COURT
NORTH CAROLINA
December 8, 2016

Employer Did Not Fail to Offer
Reasonable Accommodation

Even if the nurse was disabled, her employer did not have to provide an accommodation that was not reasonable.

Reasonable accommodation usually means some sort of modification of the physical environment or the physical operation of the job so that an employee with a disability can perform the essential functions of the position. An example might be an amplified stethoscope for a nurse with a disabling hearing impairment.

Reasonable accommodation can also include transfer of a disabled employee to a position whose physical environment or physical demands are compatible with the limitations inherent in the employee's disability, so the employee can fulfill the essential functions of the employee's position even with a disability. An example might be a sedentary job for a person with disabling mobility issues.

However, reasonable accommodation does not include the employer having to reassign a disabled employee simply because he or she cannot get along with certain coworkers or supervisors.

Reasonable accommodation did not entitle the nurse to a transfer from the extended care unit even with backup from her mental health provider that she should not go back to work there due to her mental health diagnosis. That would imply a special entitlement for the disabled which the Court deemed unfair.

Legitimate, Nondiscriminatory
Grounds for Firing

The nurse took a leave of absence and then did not return to her position, albeit on the advice of her mental health provider.

The nurse had the right to medical leave, but when the time expired there was nothing wrong with her being deemed absent without leave and terminated.

The Court saw no evidence to counter the employer's position that apparent abandonment of her job was the sole reason for the nurse's termination. She had no right to refuse to return to work unless conditions were met which her employer had no obligation to honor. **Patterson v. McDonald, __ F.Supp. 3d __, 2016 WL 7190718 (M.D.N.C., December 8, 2016).**

Visitation Denied: Court Nixes Lawsuit For Emotional Distress.

By the time the patient was admitted to the hospital dying from liver failure he had been estranged from his wife for eight years and during that time had had little contact with his adult children.

The patient's wife and adult children nevertheless came to see him in the hospital's intensive care unit. They requested the patient's live-in girlfriend not be allowed in the room when they were there. On the day the patient died a hospital security guard told the girlfriend to leave the hospital premises after she and one of the patient's children got into an argument.

Denial of Visitation
Infliction of Emotional Distress
Lawsuit Dismissed

The patient's girlfriend sued the hospital after the patient's death. Her lawsuit alleged wrongful denial of visitation rights and claimed damages for negligent infliction of emotional distress.

The Superior Court of New Jersey, Appellate Division, dismissed the girlfriend's lawsuit.

The girlfriend's lawsuit did not fit the common law parameters for a lawsuit for negligent infliction of emotional distress.

A lawsuit for negligent infliction of emotional distress is legally viable only if the defendant's negligent conduct caused the alleged victim to experience real fear of immediate personal injury, or if the alleged victim witnessed the death of or serious injury to a close family member which was caused by the defendant's negligence.

None of the parameters were present here. The girlfriend was never in fear of physical injury to herself, nor did she witness the patient suffer any physical harm due to the conduct of hospital employees.

The Court also ruled the girlfriend's lawsuit was mistaken to try to rely on Federal regulations which guarantee visitation rights to hospital patients.

Those regulations only define one aspect of Medicare and Medicaid conditions of participation for hospitals. Even if a violation of a condition of participation did occur it would not provide grounds for a private individual, a patient or family member, to file a lawsuit against a healthcare provider. **Qualantone v. Newton, 2016 WL 7176939 (N.J. App., December 9, 2016).**

Visitation rights are guaranteed to hospital patients by Federal regulations.

However, patients' visitation rights are set out in regulations which define Medicare and Medicaid conditions of participation.

Medicare and Medicaid conditions of participation, which cover a whole host of subjects, do not provide grounds for private individuals to sue hospitals and other healthcare providers.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
December 9, 2016

42 CFR § 482.13

(h) Standard: Patient visitation rights. A hospital must have written policies and procedures regarding the visitation rights of patients, including those setting forth any clinically necessary or reasonable restriction or limitation that the hospital may need to place on such rights and the reason for the clinical restriction or limitation. A hospital must meet the following requirements:

(1) Inform each patient (or support person, where appropriate) of his or her visitation rights, including any clinically necessary restriction or limitation on such rights, when he or she is informed of his or her rights under this section.

(2) Inform each patient (or support person, where appropriate) of the right, subject to his or her consent, to receive the visitors whom he or she designates, including, but not limited to, a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend, and his or her right to withdraw or deny such consent at any time.

(3) Not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation or disability.

Emotional Distress Claim By Aunt: Case Dismissed.

The patient's sister was nearby when the patient's baby was delivered by cesarean section with a heart rate of 10 to 20 and died within 25 minutes.

The fetus had failed to descend. The attending obstetrician ordered the cesarean when abnormal monitor tracings were seen. The fetal heart rate continued to decline as the cesarean was started.

The sister had dressed in surgical scrubs for the delivery but was not allowed to go into the room for the cesarean. Nevertheless she was present for the general panic and pandemonium on the unit as the baby was delivered, coded and then died.

Afterward the sister sued the hospital over her own emotional distress.

A person other than the patient can sue for emotional distress stemming from medical malpractice, if the person was a spouse or intimate family member of the patient, witnessed the malpractice and suffered emotional distress as a result.

However, this cannot be extended to friends and family in general. It only applies to persons in a cohabiting family unit, parents, children and spouses.

UNITED STATES DISTRICT COURT
NEW JERSEY
December 7, 2016

The US District Court for the District of New Jersey ruled that an aunt is not within the category of persons who can sue for their own emotional distress from being involved in or witnessing a distressing healthcare outcome.

The Court recognized it is a very special and limited circumstance when someone other than the patient can sue for malpractice. **Mendez v. US, 2016 WL 7130909 (D.N.J., December 7, 2016).**

Nurse Midwife: Physician Unqualified As To Negligence.

A patient sued claiming she was injured by negligent application by a certified registered nurse midwife of suprapubic pressure during her delivery.

A registered nurse who is certified by the State Board of Nursing as a nurse midwife is considered a specialist.

To testify against a specialist in malpractice litigation, an expert witness must have spent the preceding year in active clinical practice or in the instruction of students in the same field as the specialist.

The physician in this case is not qualified to testify as an expert on the standard of care for a certified registered nurse midwife.

COURT OF APPEALS OF ARIZONA
November 29, 2016

The Court of Appeals of Arizona dismissed the case on summary judgment without having to weigh the question of the defendant nurse's negligence.

State law in Arizona as in many US states restricts expert testimony in healthcare malpractice cases to experts who are currently involved in clinical practice or clinical education in the same field as the defendant healthcare provider against whom they propose to testify.

A physician, simply by virtue of being a physician, is not qualified and cannot testify on the standard of care for a nurse.

Without expert testimony from an expert whom the law regards as a true expert a patient's malpractice suit must be dismissed without further consideration of the merits of the case. **St. George v. Plimpton, __ P.3d __, 2016 WL 6956630 (Ariz. App., November 29, 2016).**

Post-Mortem Care: Court Rules Nurse Acted Appropriately.

The handling of a patient's remains post mortem can expose nurses and other healthcare providers to potential legal liability to the family of the deceased for reckless infliction of emotional distress.

A healthcare provider usually must go along with the family's wishes as to the handing of a loved one's remains.

However, the standard of care requires a nurse not to alter the remains of a deceased patient if the hospital has notified the medical examiner of the patient's death in the hospital.

The law sets the bar very high for the family to succeed with a lawsuit against a healthcare provider in this context.

The healthcare provider's conduct must have been extreme or outrageous, the provider must have known there was a high probability that the provider's conduct would cause severe emotional distress and the provider's conduct must have in fact caused severe emotional distress.

A healthcare provider is also not liable for an outcome which the provider in no way could anticipate, like what happened at the funeral home in this case.

APPELLATE COURT OF ILLINOIS
December 2, 2016

A two year-old died in the hospital from complications following surgery to replace the pacemaker in her heart.

The parents' lawsuit accused the treating physicians of malpractice.

The lawsuit also accused the nurse who performed post mortem care of reckless infliction of emotional distress upon the child's mother.

The Appellate Court of Illinois ruled in the hospital's favor in all respects.

Patient's Remains Sent to Funeral Home With Tubes in Place

The parents had asked the nurse to remove the plastic medical tubing inserted in the patient during surgery before the remains were sent to the funeral home, but instead the nurse taped the tubes in place externally and did not remove them.

After the body was unwrapped at the funeral home by the mother, female family members and other females involved in the Islamic washing ritual, a tube was pulled from the chest and blood spewed uncontrollably from the mouth.

Nurse Followed Instructions, Hospital's Protocol

The Court ruled the nurse acted appropriately even though she did not comply with the parents' expressed wishes.

The nurse was correct to follow her supervisor's instructions to comply with the hospital's protocol that, if the medical examiner had been notified of the patient's death in the hospital, the patient's remains were not to be altered pending a decision regarding an autopsy by the medical examiner or the family's private pathologist.

The family said right away they did not want an autopsy. The medical examiner also declined to do an autopsy, but the testimony at trial made it fairly clear the nurse did not learn that before the body was already in the morgue or at the funeral home and beyond the nurse's control.

There was no intent by the nurse to inflict emotional harm on the mother. Nothing in the nurse's conduct could be seen as extreme or outrageous. Nor could the nurse have foreseen that the mother would be handling the body at the funeral home or what would happen there. **Eid v. Loyola, 2016 Il. App. (1st) 143967, __ N.E. 3d __, 2016 WL 7163763 (Ill. App., December 2, 2016).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Preauthorization: Items Added To CMS Medicare List.

The US Centers for Medicare & Medicaid Services (CMS) has added two types of power wheelchairs to the list of durable medical equipment for which prior authorization is required for payment under Medicare.

CMS's announcement in the Federal Register for December 21, 2016 is on our website at http://www.nursinglaw.com/CMS122116.pdf

This short but complicated document indicates that preauthorization for the two new items will be phased in in different time frames in different areas of the US.

The existing list published December 15, 2015 of items for which preauthorization is required is available from our website at http://www.nursinglaw.com/CMSMasterList.pdf

Items are selected by CMS for the preauthorization list because they cost more that $1,000 for outright purchase or cost more than $100 per month for rental, and are considered at risk for unnecessary utilization.

FEDERAL REGISTER December 21, 2016
Pages 93636 - 93637

Preauthorization: Grounds For Lawsuit.

The lawsuit claimed the physician at a rural health clinic promised the father and pregnant mother that she, the physician, would contact their insurance for preauthorization for a medical-evacuation flight from Alaska to Seattle ($69,000) and hospitalization in Seattle ($23,000) for anticipated obstetric complications the rural clinic was not able to handle. The physician never followed through on her promise.

The Supreme Court of Alaska ruled the physician had no contractual obligation or fiduciary duty as a healthcare provider to solve her patient's insurance issues.

Nevertheless the Court was concerned that the physician's promise to the mother and father might have stopped them from pursuing insurance preauthorization on their own, right before the trip to Seattle and admission to a hospital there or within seventy-two hours as required by their insurance plan.

Thus, in the Court's judgment, the physician's promise to seek preauthorization, with no follow-through, could be grounds for a lawsuit. **Thomas v. Archer, __ P.3d __, 2016 WL 7030289 (Alaska, December 2, 2016).**

Fall Prevention: Court Sees Distinction Between Assistive Devices And Restraints.

The nursing facility was sued by the family after an elderly resident fell forward on her own out of her wheelchair and sustained a closed head injury from which she died.

The fall happened as a caregiver turned away for a moment to pick up the resident's shoe that had come off.

The Court of Appeals of Texas approved a $200,000 verdict.

The family's expert witnesses were the medical director of a hospice and a certified gerontological nurse.

The nursing facility did not bring in an expert. Its only legal defense was a failed attempt to get the Texas Department of Aging and Disability Services investigative report into evidence, which was overruled because it is hearsay and because the facility could not substantiate its factual foundation.

Use of restraints is not favored for fall prevention.

Many believe use of restraints actually increases fall risk.

Restraints include bars, belts and methods of tying a resident to a wheelchair.

Assistive devices, on the other hand, can be used to reduce fall risk.

Assistive devices include pommel cushions, foam wedges, reclining wheelchairs and geri chairs.

COURT OF APPEALS OF TEXAS
December 22, 2016

The family's experts testified that restraints were inappropriate for this patient. They testified further that the items that should have been used as fall risk interventions were not restraints.

Specifically, a pommel cushion, foam wedge, reclining wheelchair or geri chair is an assistive device, not a restraint.

The facility argued that those devices still cannot be used without a physician's order. The family's experts disputed whether an order was required.

Either way, the Court said that nursing and rehabilitative professionals at a nursing facility must proactively communicate their recommendations and obtain orders from residents' physicians for assistive devices needed for fall-risk mitigation. **Azle v. Patterson, __ S.W. 3d __, 2016 WL 7405794 (Tex. App., December 22, 2016).**