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LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

January 2022

Volume 30 Number 1

Hospital Patient Fall: Court Faults Nurses' Fall Risk Assessment, Interventions.

The eighty-four year-old patient was admitted to the hospital with shortness of breath and unstable angina. The physicians related his symptoms to a pulmonary embolism.

In the early morning hours of his third day he fell while alone in his bathroom and sustained a closed head injury. By 11:00 p.m. that same day he was deceased.

The jury that heard the family's lawsuit returned a verdict that exonerated the attending physician from liability but awarded damages of $1.6 million against the hospital for the nurses' negligence.

The Appellate Court of Illinois upheld the verdict, pointing to ample evidence of nursing negligence in the family's nursing experts' testimony.

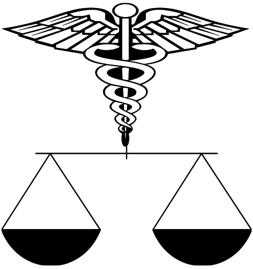
Morse Fall Scale

The nurses apparently underrated the patient's fall risk by neglecting to add twenty points to the Morse Fall Scale score for the patient's heparin lock.

Physician's Orders

The attending physician had ordered bathroom privileges with assistance. In hindsight the hospital could only show two instances in the chart where the nurses had documented providing assistance to the patient to use the bathroom.

That left open the implication that the patient was regularly getting up on his own and using the bathroom without the assistance that was ordered by the physician.



The nurses neglected to add twenty more points to the patient's score on the Morse Fall Scale for his heparin lock, which would have made him a moderate rather than a low fall risk patient.

A moderate fall risk patient would have had the bed alarm in use, which would have alerted the nurses that the patient had gotten up to go to the bathroom where he fell.

APPELLATE COURT OF ILLINOIS
December 17, 2021

Patient's Medications

The Court accepted testimony from one of the family's nursing experts that it is a nurse's responsibility to know the patient's medications, know of any recent changes to the patient's medications and know the implications of the patient's medications for the patient's safety.

This patient was prescribed Ambien as a sleep aid, which can cause drowsiness and unsteadiness in a patient with less than optimal mobility.

In fact the patient's Ambien was doubled at bedtime the night before he fell in the early morning.

The patient was also taking an anticoagulant and a diuretic, which would tend to require more frequent trips to the bathroom to urinate and more urgency to do so.

The patient was also on a laxative, which would also increase the need to use the bathroom and the urgency to get there whether or not assistance was available.

A patient with urgency to use the restroom may have the call button within reach and understand its purpose, but not be able to wait for help to arrive in time.

With such patients frequent checks and regular toileting may be necessary.

Finally, there was evidence the hospital's standard non-slip socks were not furnished to the patient as they should have been. **Lagesse v. Hospital, 2021 WL 6071563 (Ill. App., December 17, 2021).**

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Nursing Assessment: License Revoked For Gross Negligence.

After the proprietor who was also the licensed administrator of a licensed residential care facility for the elderly died suddenly, the attorney for the proprietor's probate estate retained a registered nurse who was also a certified legal nurse consultant to assist the attorney with the paperwork required by state law in order to transfer long-term care residents from one facility to another.

The plan was to move everyone out and permanently close the facility.

One of the residents for whom the nurse undertook the required assessment had deteriorated to a very perilous state of health. The nurse performed and documented his detailed assessment, but did nothing further beyond completing the paperwork for the attorney.

Two weeks later the resident was finally moved to another long-term care facility. There the same dire state of health was immediately seen, and 911 was immediately called to take the resident to a hospital, where she soon passed.

Nurse's License Revoked For Gross Negligence

The California Court of Appeal endorsed the decision of the Board of Registered Nursing to revoke the nurse's license.

The Court's published legal opinion details the shocking state of the resident's health at her first encounter with the nurse and then two weeks later at her new placement. The details are meant to amplify the appropriateness of the Board's action.

The legal precedent in the case was that the nurse has no defense in the fact he was not hired to care for the resident or to perform a function that was required by law to be done by a licensed nurse.

By law a nursing home administrator or even a lay person could have done the necessary transfer paperwork.

However, the Court validated the Board's approach that a nurse is bound by the standards of the nursing profession in any encounter with a patient in need.

The nurse should have had the patient immediately sent to a skilled nursing environment where her obvious needs could have been served. **Nurse v. Board, __ Cal. Rptr. 3d __, 2021 WL 5976759 (Cal. App., December 17, 2021).**

The nurse has no defense in the fact he was retained basically as a consultant by the attorney representing the estate of the deceased nursing home proprietor to process necessary paperwork to move the residents out so that the facility could close its doors.

The nurse was bound by the standards of the nursing profession to appreciate that the resident's condition was dire and that she needed immediately to be sent to a skilled nursing facility, not allowed to linger for two weeks while transport was arranged to another long term care facility.

It is not relevant that doing the paperwork and arranging a new placement was a function that by law could have been done by a nursing home administrator or even by a lay person with no particular medical or nursing background.

An untrained lay person would not necessarily appreciate the gravity of the resident's condition, the urgency of corrective action and what to do as corrective action.

However, when doing a task that could be considered a non-nursing function, a nurse is still bound by the standards of the nurse's professional license.

COURT OF APPEAL OF CALIFORNIA
December 17, 2021

Skin Care: Res Ipsa Loquitur Not Applicable To Progression Of Pressure Lesion.

The patient was admitted to the hospital with multiple medical diagnoses including brain abscesses, seizure disorder, diabetes and hypertension.

During his two week stay a pressure sore developed on his coccyx. The lesion was noted not to be infected when he was discharged from the hospital to a rehab facility.

In the rehab facility infection soon developed in the pressure sore. It spread to his knee. He was back in and out of the first hospital and another hospital for wound care, before he passed away from cardiorespiratory arrest.

Res Ipsa Loquitur is a legal doctrine that allows the court to find liability without specific proof of negligence, when what happened to the victim is something that ordinarily does not happen in the absence of negligence.

Skin lesions can progress unavoidably in hospitalized patients even with the best care.

A bad outcome in such a case does not necessarily imply caregivers' negligence.

COURT OF APPEALS OF KENTUCKY
December 17, 2021

The Court of Appeals of Kentucky dismissed the patient's estate's case.

Their expert physician was not able to identify any specific error or omission by the patient's caregivers that caused the progression of his skin lesion.

Negligence is not presumed in these cases simply from a bad outcome. **Estate of Thomas v. Health, 2021 WL 5979265 (Ky. App., December 17, 2021).**

Involuntary Mental Health Commitment: Start Of Clock Running On Deadline To Begin Process.

Paramedics brought the patient to the hospital in an ambulance shortly after she swallowed batteries in an apparent suicide attempt.

This was the third time within a year that she had swallowed batteries to try to kill herself.

She was admitted as a patient on a medical/surgical floor. The hospital does not have a dedicated psychiatric unit, although the hospital does have psychiatrists and social workers available to treat patients for their mental health needs while they are in the hospital for medical care.

Two Weeks of Medical Care Not Being Held Involuntarily

On the day of admission hospital physicians were able to remove one of the batteries endoscopically that had only lodged in her esophagus.

On the third day, when the other batteries failed to work their way out, a colonoscopy was done. However, that did not retrieve any of the batteries.

More than another week was necessary on the medical/surgical floor to recuperate from open abdominal surgery to remove the rest of the batteries. With her history the physicians did not think it was prudent for her to leave the hospital until her surgical staples were removed.

The mental hygiene law sets strict timelines for a patient being held involuntarily for mental health reasons to receive a physician's examination to validate the temporary hold.

Then a petition must be timely filed with the court for an involuntary hold pending a mental health evaluation to continue past a short term hold.

Then the case must go back to court again for a hearing on a long-term commitment and the parameters of that treatment, possibly including court-ordered medication.

If any of the time deadlines are ignored or allowed to be delayed beyond what the law allows, the whole process can be invalidated and the patient can be set free, regardless of any need for inpatient care, in deference to personal liberty.

SUPREME COURT OF ILLINOIS
December 16, 2021

Patient's Discharge Order Triggered Deadline to Apply For Emergency Hold

According to the Supreme Court of Illinois, the patient's stay on the medical/surgical floor was not a mental health detention, even though she was receiving bona fide mental health care from psychiatrists and social workers and actually had bedside sitters ordered most of the time as a suicide precaution.

The physicians noted she was deemed medically stable for discharge a day or two before her discharge order was actually entered in her chart.

She was not ordered to be discharged until her surgical staples were removed. After her discharge order was made official she did not go home.

Within minutes the social worker prepared papers for emergency mental health detention. The patient was examined by a psychiatrist within an hour after her discharge was ordered and examined by another psychiatrist two hours after that.

The Court ruled the process was timely initiated in full compliance with state law for involuntary hold, evaluation, re-evaluation and long-term commitment.

The Court expressly rejected the argument that the patient was being held involuntarily and illegally for mental health reasons during her medical treatment.

Once her medical care was concluded the process was timely and validly started for involuntary mental health confinement.

Julie M., __ N.E. 3d __, 2021 WL 5961629 (Ill., December 16, 2021).

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Sexual Assault By Caregiver: Court Faults Hiring, Background Check Procedure.

Misconduct: Employee Not Faulted For Pleading Her Case.

The California Court of Appeal upheld a verdict in favor of three female former patients of a psychiatric facility who were repeatedly sexually assaulted by a male employee working in the capacity of a psych technician.

Most of the Court's published legal opinion concerned the extent to which California's statutory limitations on the amount of damages in civil cases applied or did not apply. The basic fact of liability was not seriously questioned.

Faulty Background Check

When completing his employment application the perpetrator answered "No" to the question whether he had ever been arrested for a crime requiring registration as a sex offender.

In fact he was arrested eleven years earlier for a sex crime that would have required registration as sex offender if he were convicted.

He was never convicted because he was allowed to plead guilty to a lesser sexual offense that did not require registration as a sex offender.

The hospital's background check was done by a commercial vendor that was prohibited by law from looking back more than seven years at arrest records.

Without explaining the details, the Court indicated the assaults on the patients and subsequent legal exposure would not have happened if the facility had made a practice of hiring licensed CNAs for the role in which the perpetrator was working, rather than untrained persons who presumably worked for cheaper wages.

Nursing Supervision

The Court also questioned the facility's practices for nursing supervision of its employees' interactions with patients, particularly male caregivers working with vulnerable females in a psychiatric unit.

It was not enough to expect the technicians to watch and report on each other. The charge nurses needed to take a more active role, walking around and dropping in on patient rooms to see what, if anything, was really going on. **Samantha v. Hospital, __ Cal. Rptr. 3d __, 2021 WL 5996835 (Cal. App., December 20, 2021).**

If the psychiatric facility had made it its practice to hire certified nursing assistants (CNAs), instead of unlicensed persons as psychiatric technicians, the facility would never have hired the perpetrator.

The background check process for CNA certification would have disclosed his arrest and plea-bargained conviction for a sex crime and he never would have become a CNA.

In civil cases against healthcare facilities for sexual assaults against patients by caregivers, the legal question is whether the facility did or realistically should have known that the perpetrator had a demonstrated potential for sexual violence against vulnerable individuals.

A healthcare facility is not vicariously liable for its employees' intentional criminal acts.

Unlike negligent errors and omissions in providing patient care, intentional criminal acts are considered to be outside the scope of the employee's employment duties.

However, the facility can be liable for its own negligence in hiring or failing to supervise a perpetrator.

CALIFORNIA COURT OF APPEAL
December 20, 2021

An orthopedic products sales representative's job was to be present in hospitals' operating rooms during surgical cases to assist the surgeons and other members of the surgical team when one of her employer's products was to be used.

On one occasion the surgical team took issue with her action and reported her to the hospital administration for proffering and opening a bone graft product with an expired expiration date.

While the administration was investigating and deliberating what they were going to do, the sales representative retained a lawyer and the lawyer and she herself tried to plead her case directly to members of the hospital board.

That went directly against an explicit directive from her employer that she and her lawyer had to refrain from such action, and she was fired.

It was not misconduct for the sales representative to ignore her employer's directive and plead her own case directly to the hospital board.

COURT OF APPEALS OF KENTUCKY
December 17, 2021

The Court of Appeals of Kentucky noted that the sales representative was not fired by her employer over the incident in the operating room at the client hospital.

She was fired for going against her employer's directive that she not contact the hospital directly about the incident.

According to the Court, that would not be considered misconduct that would justify termination. She is not entitled to get her job back, but she is entitled to unemployment benefits.

Hospital management eventually decided they would ban her from the hospital for one year, but that did not sway her former employer to give her back her job. **Orthopedics v. Unemployment, 2021 WL 5980337 (Ky. App., December 17, 2021).**

Discrimination: African American Nurse Used Racist

Toxic Mold In The Workplace: Nurses Did Not Prove

Nursing Student, Former Adult Film Star: Court Sees

Language Toward African Nurse.

Three nurses were involved in a heated argument about allocation of nursing assignments on the unit.

One is an African American born in the USA, one is from Africa and one is from India. Their supervisor is an African from Africa.

Afterward the African American nurse alone was fired. She claimed being fired over the incident was only a veiled pretext for retaliation for an age discrimination complaint she filed months earlier against her African supervisor.

One of the three nurses involved in the argument is from India.

She was not fired as was the African American nurse, but she was not guilty of resorting to racist language directed at the other nurses or that referred to another nurse on the unit.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
December 7, 2021

The US District Court for the Eastern District of Pennsylvania dismissed the fired nurse's case.

The Court found legitimate nondiscriminatory grounds for her firing in the fact that she alone taunted a coworker with racist language.

The African American nurse taunted her coworker with the claim that she is an American, while her coworker was not, and that the coworker and her supervisor ought to be sent back to Africa where they came from and where they belonged.

The fired nurse pointed out that the nurse from India who was in the same argument was not fired, but that nurse had refrained from any impermissible racist language. **Sampson v. Services, 2021 WL 5788772 (E.D. Penna., December 7, 2021).**

Their Case.

Thirteen nurses who were employed by the US Immigration and Customs Enforcement agency sued the corporation that leased to the government the building where they worked, claiming adverse health effects from toxic mold present in the building for more than a decade.

The toxic mold, they claimed, was caused by damp conditions from leakage of water pipes and standing water on the floor. Their evidence was mold testing that corroborated the presence of certain species of toxic mold in the building and urine testing done by a physician that confirmed the presence of toxic mold metabolites.

Court precedents for toxic mold cases have required proof of the presence of the mold and how it got there, proof of exposure to the mold in a dose sufficient to cause health effects and proof of actual health effects caused by the mold.

UNITED STATES DISTRICT COURT

LOUISIANA

The US District Court for the Western District of Louisiana dismissed the case as to all but one of the nurses, based on the defense's evidentiary challenge to the nurses' expert physician's methodology.

First, a lawsuit cannot be proven from the fact the mold present can cause illness. Proof is required that it did, in fact, cause illness to the parties who filed the lawsuit.

Second, the Court was skeptical of the urine testing used to detect toxic mold metabolites. The test that was used is not approved by the FDA. The testing also disclosed metabolites in the nurses' urine associated with molds never found in the building where they worked.

One nurse claiming aggravation of her preexisting asthma has a legitimate case, the Court ruled. **Hill v. Group, 2021 WL 6053783 (W.D. La., December 21, 2021).**

Discrimination Based On Gender Stereotype.

A community college nursing student was dismissed from the program after receiving failing grades from her instructors in two core nursing classes.

One of the instructors had given her negative feedback about her prior career as an actress in adult films.

She was told that nursing is a profession for a certain type of woman, and she was not the right type.

Federal law prohibits educational facilities from discriminating against students on the basis of gender stereotypes.

That prohibition has been applied by the courts to protect LGBTQ students from discrimination.

However, the law can be extended to protect this student from discrimination based on a stereotype for the type of woman who is the appropriate image for the nursing profession.

UNITED STATES DISTRICT COURT
OREGON
December 3, 2021

The US District Court for the District of Oregon declined to grant the college a summary judgment of dismissal of the former student's case.

She will get her day in court to attempt to prove that discrimination based on a gender stereotype supposedly proper for women in nursing was the reason for her failing grades and dismissal from the nursing program, rather than basic academic insufficiencies on her part. **Gililland v. College, 2021 WL 5760848 (D. Oregon, December 3, 2021).**

Hypertension, Patient Teaching: Nurse Practitioner Deviated From The Standard Of Care.

Nurse As Patient Advocate: No Proof Requesting Physician Consult

The US Court of Appeals for the Seventh Circuit has upheld a judgment of almost $30,000,000 awarded to the patient by the US District Court for the Southern District of Illinois.

We reported a previous ruling from the District Court in April 2017. See ***Hypertension: Nurse Practitioner Deviated From The Standard Of Care.*** (26)4 p.3.

The suit was filed against the US government over the patient's care at a US Public Health Service medical facility where the patient was seen sporadically over a period of years by a nurse practitioner following an initial visit for highly elevated blood pressure at a pre-employment physical exam.

The size of the award takes into account the fact the patient now has irreversible kidney disease related to his poorly treated, that is, essentially untreated hypertension.

He is now on kidney dialysis and it is fairly certain he will eventually need a kidney transplant. In addition to the expense and suffering is the possibility a suitable donor will not be found and prioritized in time for him or that the transplant will fail due to organ rejection.

Patient's Subjective Understanding

From a legal standpoint the Court of Appeals ruled it is not relevant to delve into the patient's own subjective understanding of his disease and his need for treatment, to see if a defense can be mounted for the caregivers based on the patient's own negligent noncompliance.

Instead, the standard for judging a caregiver in a long-term treatment relationship with a hypertensive patient is the average patient's understanding of the ramifications of a diagnosis of high blood pressure and appreciation of the consequences of noncompliance with treatment.

The average person's understanding of untreated hypertension, according to the Court of Appeals, is basically nil. Caregivers can be held to a very high standard if their efforts at patient teaching are called into question after the fact in a patient's lawsuit. **Clanton v. US, __ F. 4th __, 2021 WL 5984798 (7th Cir., December 17, 2021).**

The legal standard of care for a nurse practitioner educating a patient with hypertension is based on the level of understanding an average person would have about a diagnosis of hypertension and the need for treatment.

An average person would not appreciate that high blood pressure is a silent killer that can cause progressive damage to vital organs even while symptoms of illness are completely nonexistent.

An average person would only understand that something is wrong and something must be done if there are symptoms of hypertensive crisis, like headache, dizziness or blurred vision.

When those symptoms have subsided, everything would seem back to normal, to an average person.

That points to a need for caregivers to educate, reeducate and continue to reeducate hypertensive patients about the dangers of high blood pressure and the need for frequent checks and strict daily compliance with a medication regimen.

The alternative is a medical disaster for the patient and a potential legal disaster for the caregiver.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT
December 17, 2021

Would Change The Bad Outcome.

The twenty-eight year-old patient went to the ICU still intubated after surgery to correct a small bowel obstruction.

Her condition deteriorated rapidly due to insufficient oxygenation from poor ventilation, and she died.

The proof is lacking that if the hospital's ICU nurses had contacted the pulmonologists' medical practice group directly, a physician pulmonologist would have come to the hospital to see the patient, and that would have averted the tragic outcome.

The ICU nurses were not permitted by the hospital to make contact with the pulmonologists.

Instead the hospital's ICU nurses were to communicate their concerns to the pulmonologists' nurse practitioners stationed in the ICU, which the hospital's ICU nurses did.

UNITED STATES DISTRICT COURT
MISSISSIPPI
December 7, 2021

The US District Court for the Southern District of Mississippi faulted the pulmonologists' group that practiced in the hospital's ICU, but granted a summary judgment of dismissal to the hospital.

The Court rejected the allegation the hospital was liable for its nurses' failure to advocate for the patient. It was not proven that contact from the ICU nurses would have brought a pulmonologist to the ICU. **Gagliardi v. Clinic, 2021 WL 5813821 (S.D. Miss., December 7, 2021).**

No Spoliation Of The Evidence: Court Will Not Allow Discovery Of Emails To The Hospital.

No Spoliation: Court Will Not Penalize For Missing Records.

The parents sued the hospital where their child was held for thirty days on suspicion of child abuse in the home.

The child was eventually discharged on condition she would go to her grandparents' home who would have legal custody.

Also named in the lawsuit was the local child protective service and several physicians involved in the child's treatment and the decision to keep the child until appropriate custody was arranged.

Physician's Emails to the Hospital

The preliminary legal issue at this time is whether the parents' attorney will be allowed discovery of emails from a physician to certain persons at the hospital concerning the child's situation.

The attorney apparently is looking for grounds to claim spoliation of the evidence for the hospital having withheld the emails.

No Spoliation of the Evidence

The US District Court for the Southern District of Ohio ruled the attorney has only an exceptionally weak case of spoliation. In so ruling the Court took the time to review an important legal parameter of the spoliation doctrine.

It is not relevant that the physician in her email about the child said that the matter could end up in court.

The duty to preserve evidence arises in the context of avoiding an allegation of spoliation only after the party has been sued or has been given an explicit threat of being sued. The duty does not arise when a party merely suspects that something that happened could end up in a lawsuit.

The attorney had contacted the hospital and had expressed a desire to discuss the emails sent at and to the hospital.

An expressed desire to discuss the case is different from an expressed threat to sue, according to the Court.

A threat from the attorney to sue would have involved a Constitutional rights complaint, which would apply to child protective services as a governmental agency, but not the hospital as a private-sector corporation, another reason for the hospital not to see itself as a target for litigation. **Siefert v. County, 2021 WL 5918893 (S.D. Ohio, December 15, 2021).**

Spoliation of the evidence refers to intentional loss or destruction by one party in a legal case of evidence in the party's possession or control that is relevant to the opposing party's ability to proceed with their case.

If spoliation can be proven the court can penalize the party who committed the spoliation.

The most serious penalty allowed is for the judge to make an adverse inference that the missing evidence would hurt the party's case who committed spoliation and decide the case against them, or instruct the jury that it can reach a verdict against the party for that same reason.

To get the adverse inference in its favor and the penalty for the other side, the party must prove that the party who committed spoliation was under an obligation to preserve the evidence when it was lost or destroyed, that the spoliation was done with the intent to deprive the opponent of vital evidence and the evidence most likely would have been damaging to the party's case who committed spoliation and advantageous to the other party's case.

UNITED STATES DISTRICT COURT
OHIO
December 15, 2021

The attorney for a former patient who sued the hospital for malpractice petitioned the trial court to impose sanctions against the hospital for spoliation of the evidence.

The hospital insisted the records the attorney sought, which the hospital could not produce, were destroyed in a fire at an off-site storage facility. The hospital learned of the records' destruction when similar records were sought in civil discover in another case some years earlier.

The issue is irrelevant whether the hospital was guilty of culpable intent for a fire that destroyed the records in question at an off-site storage facility.

The records pertained to maintenance checks on the equipment in the hospital's surgical instrument processing unit.

The records would not have shown whether any particular batch or set of surgical instruments was properly sterilized for the day of the patient's surgery.

NEW YORK SUPREME COURT
APPELLATE DIVISION
December 14, 2021

The New York Supreme Court, Appellate Division, declined to penalize the hospital over the unavailable records.

The Appellate Division did not weigh the hospital's culpability for the fact the records were missing.

The pivotal issue was the fact the records, even if they were available for discovery by the patient's attorney, would have had nothing to say about the central issues in the patient's case. **Marchese v. Aston, __ N.Y.S. 3d __, 2021 WL 5893766 (N.Y. App., December 14, 2021).**

COVID-19: CMS's New Vaccination Mandate On Hold In Fourteen US States.

Emergency Room: No Search Warrant For Blood Draw From Unconscious Patient.

On November 5, 2021 the US Centers for Medicare and Medicaid Services (CMS) added mandatory COVID-19 vaccination of employees as a condition of Medicare or Medicaid participation for healthcare providers.

We reported this development in our December 2021 newsletter and placed CMS's announcement from the Federal Register on our website at http://www.nursinglaw.com/CMS110521.pdf

The actual regulations for hospitals and long-term care facilities begin on page 65 of the PDF document or Federal Register page 61619.

On December 15, 2021 the US Court of Appeals for the Fifth Circuit blocked enforcement of the COVID-19 vaccination mandate by CMS in Louisiana, Montana, Arizona, Alabama, Georgia, Idaho, Indiana, Mississippi, Oklahoma, South Carolina, Utah, West Virginia, Kentucky and Ohio.

The COVID-19 vaccination mandate stands undisturbed in the rest of the US. **Louisiana v. Beccerra, __ F. 4th __, 2021 WL 5913302 (5th Cir., December 15, 2021).**

A head-on collision resulted in one driver's death and the other's conviction for vehicular homicide after four prior convictions for DUI. The California Court of Appeal upheld his conviction and prison sentence of fifteen years to life.

The Court overruled his legal appeal which argued that his rights were violated because an emergency room nurse drew two blood samples from him at the direction of a state trooper who did not have a search warrant for a blood draw.

The perpetrator himself had been airlifted to the emergency room by helicopter for his own serious injuries from the crash. He was still unconscious when his blood was drawn right before he went into the operating room for surgery which had to be started whether or not he had woken up.

The Court pointed to a 2019 US Supreme Court ruling that no search warrant is needed to draw blood from an unconscious patient who cannot perform a breathalyzer, assuming there is probable cause for driving under the influence. **People v. Defendant, __ Cal. Rptr. 3d __, 2021 WL 5997961 (Cal. App., December 20, 2021).**

FMLA Retaliation: Heightened Scrutiny Of Employee After Return From Medical Leave.

A hospital emergency room technician was known by her supervisors to have been diagnosed with bipolar disorder and anxiety.

She had to take medical leave for ten days for treatment for tachycardia. The hospital granted the leave to which she was entitled by law under the US Family and Medical Leave Act (FMLA).

However, the very day she returned to her unit her supervisor claimed to have reasonable suspicion she was using illicit drugs and forced her to undergo a drug screen. It was negative for street drugs and legal prescription meds but she was still suspended for almost three more weeks.

She was told she could not return from her suspension until she was cleared by a psychiatrist and a cardiologist. She got the necessary clearances and also had another completely negative drug screen.

The very day the employee returned from approved Family and Medical Leave Act (FMLA) leave, she was confronted, accused of using illicit drugs, made to submit to drug testing and suspended from her unit's work schedule.

The temporal proximity of her supervisors' actions with her FMLA leave creates an inference of illegal retaliation for exercising her right to FMLA leave.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
December 14, 2021

After she fell asleep while on a work break another drug test was required and again proved negative, but she was nevertheless terminated.

The US District Court for the Eastern District of Pennsylvania dismissed aspects of her case against her former employer that alleged disability discrimination, finding no connection between her supervisors' actions toward her and a disability.

However, the Court did let the case go forward based on allegations of illegal employer retaliation for her exercise of her legal right to FMLA leave.

The whole business of repeated drug testing and heightened scrutiny of her health and her work began closely in time after she used her FMLA leave. That created an inference of retaliation strong enough for a lawsuit against her former employer. **Thomas v. Hospital, 2021 WL 5906350 (E.D. Penna., December 14, 2021).**