

## Narcotics Diversion: Court Looks At Federal Regulations For Skilled Nursing Facilities.

A skilled nursing facility was issued a citation for violations of Federal regulations after an employee managed to steal 2,446 Lortabs, a controlled substance containing narcotic hydrocodone.

State survey inspectors found violations of three separate Federal regulations:

[42 C.F.R. § 483.25\(m\)](#) requires a facility to be free of a medication error rate greater than five percent and ensure that residents are free of any significant medication errors.

[42 C.F.R. § 483.60](#) requires a facility to provide pharmaceutical services, including procedures that ensure accurate acquiring, receiving, dispensing and administering of all medications to meet the needs of its residents.

[42 C.F.R. § 483.20\(k\)\(3\)\(i\)](#) requires in general terms that services provided must meet professional standards of quality.

The US Court of Appeals for the Fifth Circuit (Mississippi) found that violations were committed and upheld the citation.

A survey conducted right after the theft of narcotics revealed that the facility had failed to develop written policies and procedures to ensure that facility staff did not misappropriate medications and had failed to have appropriate policies and procedures to manage the ordering and inventorying of medications.

A second survey eight months later resulted in citations for failure of the facility's quality assessment committee to address the medication-related deficiencies identified in the first survey, for inadequate clinical recordkeeping, for failing to inform the local police about the Lortab theft and for certain specific medication errors that resulted in residents not getting their prescribed medications.

The facility was hit with civil monetary penalties totalling \$467,500 based on the deficiencies found in the two surveys.

The Court declined to accept the facility's argument that an error rate of less than five percent is the only defining factor in medication management. **Perry Co. v. US Dept. of HHS**, \_\_\_ Fed. Appx. \_\_\_, 2015 WL 1036105 (5th Cir., March 11, 2015).

***Compliance with a Federal regulation's requirement that a facility have a medication error rate lower than five percent does not automatically absolve the facility from compliance with other regulations dealing with handling and dispensing medications.***

***The facility is in error to believe it has virtual carte blanche in managing its medications, so long as the medication error rate remains below five percent and no significant medication error occurs.***

***A skilled nursing facility may permit unlicensed personnel to distribute medications under the general supervision of a licensed nurse.***

***However, the overall operation of the facility's pharmaceutical practices must be managed by a licensed pharmacist who is employed by or who consults with the facility.***

***The system established and managed by the pharmacist must be able to account for all controlled substances and reconcile administration with changes in inventory, to prevent unauthorized diversion.***

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT  
March 11, 2015

## Drainage Tube: Nurse Ruled Not Negligent.

The day after surgery a nurse came to the patient's hospital room and pulled the drainage tube out of his surgical wound.

Four months later a CT scan revealed that a 4.25 inch piece of tube had been left behind. It was removed surgically.

The patient sued the hospital alleging the nurse was negligent.

***This case is not the same as a retained-object case from the operating room.***

***There is no question what happened or how it happened.***

***The only question is whether the nurse was negligent.***

DISTRICT COURT OF APPEAL  
OF FLORIDA  
February 18, 2015

The District Court of Appeal of Florida upheld the jury's verdict of no nursing negligence.

The Court declined to view the case the same as a retained-object case from the operating room in which the caregivers would have to disprove their negligence.

The fact a fragment broke off during the tube's removal, in and of itself, did not prove the nurse used excessive force or speed in pulling the tube out of the wound as the patient's expert claimed.

Instead, the jury was entitled to rule as it did assigning greater weight to the hospital's expert's opinion that the nurse did not depart from the standard of care, notwithstanding the unfavorable outcome.

As to the fact the nurse apparently did not inspect the tube afterward to ascertain that she had removed all of it, the Court said that even if she had inspected it and realized that a piece was missing, the patient still would have had to undergo another minor surgical intervention to retrieve it. **Dockswell v. Bethesda Memorial**, \_\_\_ So. 3d \_\_\_, 2015 WL 669610 (Fla. App., February 18, 2015).