LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Nursing Home Negligence: Arbitration Will Go Forward Despite AAA Policy Change.

The day after the resident was admitted to long-term care, his daughter, whom he had named in his durable power of attorney, signed several documents related to his admission, including an arbitration agreement.

Slightly more than three years later, after the resident had died, the same daughter, acting as executor of her late father's probate estate, filed a lawsuit against the nursing facility alleging that her father's death was caused by negligence committed at the facility.

The nursing home countered the daughter's civil lawsuit by asking the court to take the case off the jury trial docket so that it could be resolved by alternate dispute resolution, that is, by arbitration based on the arbitration agreement.

AAA Has Changed Its Position On Pre-Dispute Arbitration Agreements

One of the estate's arguments against arbitration was that the American Arbitration Association (AAA), a widely used provider of arbitration forms and arbitration services, recently changed its official position and will no longer handle arbitrations where the arbitration agreement, as in this case, was signed before the actual dispute arose between the patient or patient's representative and a healthcare provider.

The Court of Appeals of North Carolina ruled that did not change the fact there is still a strong public policy in favor of alternative resolution of disputes in the healthcare arena.

The basic AAA arbitration agreement signed in this case called for the arbitration to proceed by the AAA rules, and that was how it would proceed, the Court said, even if the AAA itself would not be involved.

No Problem With the Agreement

The arbitration agreement was separate from the rest of the admission papers, was clearly labeled as a arbitration agreement, was presented to the daughter for her voluntary signature, urged her to consult with her attorney before signing and was not held out as a condition of admitting or keeping her loved one in the facility.

The daughter had the opportunity to read the arbitration agreement, knew what it meant and signed it voluntarily. Like any other contract, the arbitration agreement was entitled to enforcement at the nursing facility's behest, the Court ruled. **Westmoreland v. High Point, __ S.E. 2d __ , 2012 WL 120043 (N.C. App., January 17, 2012).**

Incomplete Nursing Documentation: Jury Gives Critical Care Nurses The Benefit Of The Doubt.

The patient sued the hospital where she was treated for multiple trauma after a serious motor vehicle accident. She claimed in her lawsuit that her spinal injuries were compounded by mishandling at the hands of the nurses in the hospital's neurocritical unit.

There were orders from the physicians to the nurses for spine precautions which included use of a three-person log-rolling technique any time the patient was moved in bed for treatments, bathing, toileting, linen changes, etc.

The nursing progress notes did not explicitly document use of the above technique each time she was moved.

Hospital standing policies also called for posting a spine-precautions sign above the head of the bed of any spine-precaution patient, which apparently was not done this time.

"If you didn't chart it, you didn't do it," is an accepted maxim of nursing practice.

It means that the defendant nurses and hospital could have difficulty proving something not documented was actually done.

It does not necessarily prove affirmatively that care was not provided, as the patient's expert erroneously testified. It just sets up a risky question of credibility for the jury to resolve.

COURT OF APPEALS OF UTAH
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The patient's physician expert testified that lack of explicit mention of the three-person log-rolling technique each time it was noted that the patient received care in bed over eleven days was affirmative proof the nurses did not use correct technique and, therefore, that changes seen on a later spinal MRI compared to one right after admission were caused by nursing negligence.

The Court of Appeals of Utah, however, affirmed the jury's verdict of no negligence by the nurses based on the testimony of the hospital's nursing expert that it was the practice in the neurocritical unit always to log-roll spinal patients unless the nurses were told otherwise and that it was fully documented in the chart the patient was on spine precautions. **Turner v. Univ. of Utah Hosp., __ P. 3d __, 2011 WL 6425438 (Utah App., December 22, 2011).**

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