

## Sexual Assault, CNA vs. Patient: Court Considers Hospital's Liability For Damages.

***The patient's case against the hospital relies on two legal theories of liability, negligent hiring and negligent supervision and retention as an employee.***

***An employer is liable to an innocent victim for negligence in the decision to hire an employee who perpetrates a wrongful act, but only if there is sufficient evidence that the employer knew or reasonably should have known of the employee's tendency toward certain behavior similar to that which produced the injury sustained by the innocent victim.***

***Once an employee has been properly hired, the employer still has an ongoing legal duty not to retain an employee the employer learns or reasonably should have learned poses a risk of harm comparable to the harm suffered by the innocent victim.***

***In this case there was nothing wrong with the application process or the decision to hire the CNA.***

***However, after he was hired there was a credible report of an aggressive, non-consensual physical contact with a vulnerable female patient.***

COURT OF APPEALS OF GEORGIA  
July 6, 2015

An adult female patient was sexually assaulted and raped in her hospital room by a hospital CNA.

Fearing reprisals, she did not report it right away. However, three days later when she had to speak frankly with her doctor about her new abdominal pain she revealed what had happened.

The CNA was arrested and pled guilty to a criminal charge of rape.

### **Court Ruling On Civil Allegations Against the Hospital**

The victim and her husband sued the hospital for civil negligence for hiring the CNA in the first place and for civil negligence for failing to supervise him and for keeping him on the hospital's staff.

The Court of Appeals of Georgia threw out the allegation of negligent hiring but let the case go forward on the allegation of negligent supervision and retention.

### **No Negligent Hiring**

The hospital obtained a written employment application, interviewed the CNA, confirmed his prior employment, verified his CNA certification and obtained a criminal background check. No adverse information came up except for a six-year-old misdemeanor for passing a bad check.

The Court ruled there was no basis at the time of his hiring to suspect the CNA was capable of a sexual assault.

### **Negligent Supervision, Retention**

After he was hired there was a reported incident where the CNA inappropriately touched a vulnerable female patient.

The Court characterized that incident five years earlier as an aggressive, non-consensual sexual contact which put the hospital on notice that the CNA posed a threat of the same sort of harm the patient suffered. Prior notice is a basic element for the hospital to be held liable.

Nevertheless, the Court was not convinced that the CNA's employment history of complaints of rough, rude and derogatory behavior toward female patients, and a bad attitude, put the hospital on notice that he posed a threat of a sexual assault upon a vulnerable patient. Little-Thomas v. Select, \_\_ S.E. 2d \_\_, 2015 WL 4069534 (Ga. App., July 6, 2015).

## Nurse Writing Prescriptions: Court Discusses Hospital's Liability.

A nursing supervisor in the hospital's surgery department reportedly had an arrangement with an independent contractor physician who practiced in the hospital to use his prescription pad and DEA number to write occasional prescriptions for her own family and friends.

She wrote several prescriptions for a coworker for the oral antibiotic clindamycin for persistent jaw pain, which the coworker filled at the hospital's pharmacy.

After the pain did not resolve the coworker went to a physician who switched him to IV vancomycin. By then the patient's osteomyelitis had progressed to necrosis in the jaw bone.

***The hospital cannot be sued on a legal theory of medical malpractice for the nurse's negligent diagnosis and medication order.***

***That was wholly outside the scope of her job as a nurse for the hospital.***

***However, certain people at the hospital knew what she was doing, in particular the hospital pharmacist who filled the nurse's prescriptions, and someone should have stopped her.***

UNITED STATES DISTRICT COURT  
ARKANSAS  
June 30, 2015

The US District Court for the Western District of Arkansas saw evidence that the hospital was implicitly aware that the nurse, a hospital employee, was engaged in ongoing wrongful conduct, practicing medicine illegally, which posed a risk of harm to other persons.

That awareness required the hospital to take action to stop what its employee was doing and made the hospital liable for the consequences. Isham v. Booneville, 2015 WL 396701 (W.D. Ark., June 30, 2015).