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THE EVOLVING REVOLVING STANDARD OF CARE

By: *STEVEN M. MONTRESOR, ESQ.*

Exposure to liability for long-term care facilities is expanding at an alarming rate. As discussed in this month's *Forum* article by Tanya Daniels Harris, violations of licensure standards are now being used by plaintiffs' attorneys to establish that facilities are negligent in delivering care to residents, creating unexpected and serious legal consequences for providers. In addition, recent cases have emphasized that the standard of care a facility owes to its residents varies from resident to resident, taking into account factors including the resident's physical and mental capacities. These developments have far-reaching operational implications. Facilities must not only assess and address the risks attendant in the delivery of medical care to a resident, but also the risks associated with providing other support services to a resident.

In a Georgia case, *Owens v. DeKalb Medical Center, Inc.*, an independent living facility resident ("Owens") brought an action against the facility and others for injuries she suffered while exiting a revolving door at an off-site medical center. An employee of the facility had driven several residents to a medical center to attend a senior fair. Owens was the only resident using a walker. Upon departure from the senior fair, the driver directed her passengers to exit the medical center through a revolving door. The driver testified that she asked Owens to wait for her while she went to get the van. Owens told her that she was afraid to go through the door. The driver assured Owens that she would return to assist her through the door. After the driver left to get the van, residents began exiting the building through the revolving door. Not wanting to be left behind, Owens tried to exit through the revolving door with her walker and without assistance. While in the door, she fell and was injured.

The court noted that the facility, through its employee, had assumed the responsibility of transporting residents to and from the medical center. Insofar as it had assumed this duty, the facility had to exercise appropriate care for the resident. In determining the appropriate care the facility needed to provide to Owens, the court indicated that factors such as the resident's advanced age must be considered. Essential to the court's reasoning is the principle that when an individual or entity undertakes a duty, it must perform that duty within the appropriate standard of care. In the case of residents of long-term care facilities, this duty is defined in part by the residents' physical and mental capacities.

The idea that standards of care hinge on a resident's physical and mental limitations was also raised in an Arkansas case entitled, *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.* In *Regions Bank*, a Certified Nurse Aide sexually assaulted a semi-comatose quadriplegic nursing resident. The resident's personal representative alleged that the nursing home did not provide the resident with the care and attention required by her condition. The essence of the complaint was that the facility was negligent in permitting unaccompanied access to helpless female patients by male aides who had little or no healthcare experience. The resident's expert testified that the facility was also negligent insofar that it needed to more closely supervise aides who had not been on the job long enough to establish a record of patient care and dependability.

According to the court, given the resident's total inability to care for herself, the facility was responsible for every aspect of her well-being, noting that the provision of a safe
(See **STANDARD OF CARE**, p. 3)

INSIDE THE FIRM

LATSHA DAVIS & YOHE, P.C. is pleased to announce that Tanya Daniels Harris, Patricia A. Hennessy, and Nicole D. Snyder have joined the firm as Associates.



TANYA DANIELS HARRIS

A new Associate in LATSHA DAVIS & YOHE, P.C.'s Harrisburg office, Tanya Daniels Harris received her Bachelor of Journalism degree from the University of Texas at Austin, where she earned the Texas Achievement Award from 1991 to 1995 for her academic achievements,

leadership, and potential for excellence. Her Juris Doctorate degree is from the University of Pittsburgh School of Law, where she also received a Certificate in Health Law. Before joining the firm, Ms. Harris worked as a law clerk in the Department of Public Welfare's Bureau of Hearings and Appeals. Ms. Harris's practice currently encompasses many areas of healthcare law, including Medicare and Medicaid reimbursement, compliance issues, survey and enforcement, and long-term care regulatory and licensure issues.



PATRICIA A. HENNESSY

Patricia Hennessy has joined LATSHA DAVIS & YOHE, P.C. as an Associate in the Malvern office. Prior to her association with the firm, Ms. Hennessy served as in-house counsel to Synthes (USA), an international manufacturer and distributor of orthopedic implant

devices. A *cum laude* graduate of Temple University (B.A., Journalism) and Temple University School of Law (J.D.), Ms. Hennessy currently focuses her practice on charter school law, special education law, environmental law, unemployment compensation, and workers' compensation.



NICOLE D. SNYDER

A recent addition to the roster of LATSHA DAVIS & YOHE, P.C.'s Associates, Nicole Snyder is based in our Malvern office. Ms. Snyder concentrates her practice in the areas of charter school law, special education law, workers' compensation, unemployment compensation, and environmental law. Ms. Snyder is a *magna cum laude* graduate of Villanova University, where she earned a Bachelor of Arts degree in English, as well as Villanova University School of Law, where she earned her Juris Doctorate degree.

NEGLIGENCE PER SE: A NEW INTERPRETATION OF THE LAW

By: TANYA DANIELS HARRIS, ESQ.

In a break with established precedent, the United States District Court for the Eastern District of Pennsylvania ("District Court") held that policies expressed in federal and state nursing facility licensure statutes could form the basis for a finding of negligence per se against a nursing facility. Typically, a finding of ordinary negligence occurs when a person breaches a duty, sometimes referred to as the "standard of care", that they owe another individual. A finding of negligence per se occurs when an individual or entity breaches a particular policy or standard set forth in a law or regulation that is used to define the duty owed by one individual to another.

In McCain v. Beverly Health and Rehabilitation Services, Inc., a resident allegedly died from pressure sores while at Phoenixville Manor, a nursing facility located in Chester County, Pennsylvania. Subsequently, the administratrix of the resident's estate filed a negligence suit against the nursing home. The nursing home sought to dismiss the negligence per se allegations contained in the complaint.

Federal and state licensure statutes and regulations do not afford a private right of action to a resident against a nursing home for alleged breaches of these laws and regulations. Thus, the issue presented in McCain was whether federal and state statutes could be utilized to establish negligence per se. Historically, the District Court ruled against such a finding. In this case, however, the District Court recognized that, "[a] statute may still be used as the basis for a negligence per se claim when it is clear that, despite the absence of a private right of action, the policy of the statute will be furthered by such a claim because its purpose is to protect a particular group of individuals." The District Court found the care requirements imposed by the Omnibus Budget Reconciliation Act ("OBRA") and the Older Adult Protective Services Act ("OAPSA") were each intended to protect the resident from the specific kind of harm she suffered, which in this case was pressure sores. Based on such findings, the District Court held that, "the lack of a private cause of action is not enough to preclude the use of the relevant policies expressed in the statutes and regulations. The furtherance of those protective policies is a basis for delineating a nursing home's tortious duty in these circumstances."

As a result of the McCain decision, federal OBRA and state licensure regulations may be used as a basis for a finding of negligence per se, even though the statutes and regulations do not explicitly state that an individual may bring suit when a nursing home deviates from those standards. Therefore, policies and standards set forth in the above statutes may be utilized by potential plaintiffs to define the duty a long-term care facility owes to a resident. This recent change in the law again highlights the need for facilities to be vigilant in the delivery of quality care through systems designed to monitor, detect and correct any potential lapses.

CONSTRUCTION SALES TAX EXEMPTIONS AVAILABLE TO CHARITABLE ORGANIZATIONS

By: JONATHAN M. CRIST, Esq.

In general, a charitable organization and its construction contractors are required to pay Pennsylvania sales tax on materials, supplies and equipment used in the construction, reconstruction, remodeling, renovation, repairs or maintenance of real estate. However, certain “building machinery and equipment” purchased by a construction contractor on behalf of a purely public charity holding a sales tax exemption are exempt from Pennsylvania sales tax as long as the items are used in the organization’s charitable mission and not in an unrelated trade or business.

Categories of Exemption

Eligible building machinery and equipment is defined as generation equipment, storage equipment, conditioning equipment, distribution equipment, and termination equipment, regardless of whether the item constitutes a fixture or is otherwise affixed to the real estate, damage would be done to the item or its surroundings upon removal, or the item is physically located within a real estate structure.

The exemption is restricted to the following:

- Air conditioning equipment, limited to heating, cooling, purification, humidification, dehumidification, ventilation (including boilers, chillers, air cleaners, humidifiers, fans, pumps, and grills, etc.);
- Electrical (not including wire, conduit, receptacle and junction boxes);
- Plumbing (not including pipes, fittings, pipe supports and hangers);
- Communications equipment, limited to voice, video, data and sound (e.g., telephones, speakers and horns);
- Alarms, limited to fire, security and detection (including

motion detectors and card access devices);

- Control systems, limited to energy management, traffic, and parking lot and building access (including traffic signals, guardrails and medial devices);
- Medical systems, limited to diagnosis and treatment, medical gas, nurse call and doctor paging;
- Laboratory systems;
- Cathodic protection systems; and
- Furniture, cabinetry, laundry and kitchen equipment.

Eligible building machinery and equipment does not include guardrail posts, underground tanks, insulation, or ductwork and its covering.

Claiming the Exemption

Charitable organizations may claim the exemption by tendering a Pennsylvania Sales Tax Exemption Certification (Form REV-1220) to the vendor. The Exemption Certificate should be properly executed and given to the vendor within 60 days of purchase. If the exemption certificate is tendered by a contractor, it should contain the following statement:

Property or services qualify as building machinery and equipment, and will be transferred pursuant to a construction contract to [name of tax-exempt entity] and, if an institution of purely public charity, “holding Sales Tax exemption #75-[tax exempt number].”

Additional information may be found in Publication REV-627 available on the Pennsylvania Department of Revenue’s website at www.revenue.state.pa.us. ■

(STANDARD OF CARE, cont. from front page)

environment for residents is within the scope of the professional services provided by a nursing home. The court found it significant that the resident could not call out for help, and was wholly at the mercy of those who cared for her at the facility. As the court noted, “As events of recent years have sadly shown, nursing home residents... have been the victims of assault not only by employees but also by others, even persons wandering in off the street. The natural and probable consequence of failing to provide a reasonably safe nursing home or hospital is injury or assault.”

While the Regions Bank decision does not suggest what the facility may have done to prevent the assault, it does emphasize that the standard of care owed to a resident is related to the mental and physical capacities of a particular resident. The court clearly found it significant that the resident was unable to defend or care for herself. The opinion suggests that for residents with limited physical and mental capacities, the standard of care owed to that resident is heightened.

These cases demonstrate the need for providers to be proactive in assessing areas of risk and developing means of minimizing risk exposure. The Owens case is a cautionary tale against assuming a duty and not fully appreciating the risks involved. Owens in particular demonstrates the need for identifying and addressing issues that may arise for staff and volunteers when providing services or engaged in activities, regardless of whether those services and activities are medical or non-medical in nature. Both Owens and Regions Bank emphasize that the standard of care is malleable and results in the need for higher levels of precaution and protection for residents with diminished physical or mental capacities. A facility’s safety or risk assessment committee should identify problem areas and take steps to address those risks through training and education. ■

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SEMINARS



PANPHA	December 6, 2002	"Practical Guidance on HIPAA Compliance"	Kimber L. Latsha, Esq. & David C. Marshall, Esq.
PA Bar Institute	March 12, 2003	"Nursing Home Neglect and Abuse Litigation"	Kimber L. Latsha, Esq. & Martin S. Kardon, Esq. of Kanter, Bernstein & Kardon
Council on Education Management	March 19-20, 2003	"FMLA Update 2003"	Glenn R. Davis, Esq. & Chadwick O. Bogar, Esq.
AHLA	April 3, 2003	"Medicare/Medicaid Update"	Kimber L. Latsha, Esq. & Lawrence Wilson, Esq. of HCFA
OHCA	May 7, 2003	"Caution: OSHA Is Knocking at Your Door"	Glenn R. Davis, Esq.
	May 7, 2003	"Corporate Restructuring: A Response to the Liability Crisis"	Douglas C. Yohe, Esq.
	May 8, 2003	"Hot Topics in Labor, Employment and Human Resource Law"	Glenn R. Davis, Esq.
Sterling Education Services	May 20, 2003	"Recent Developments in Employment Law"	Glenn R. Davis, Esq.

SUPERIOR COURT CREATES NEW ACTION FOR WRONGFUL DISCHARGE

By: *GLENN R. DAVIS, ESQ., & CHADWICK O. BOGAR, ESQ.*

Recently, a divided Superior Court broadened an exception to the employment-at-will doctrine. In *Rothrock v. Rothrock Motor Sales*, the Superior Court ruled in a case of first impression that an employee who is fired for refusing to dissuade a subordinate from pursuing a workers' compensation claim may now bring a wrongful discharge claim against his or her employer.

Relying on *Shick v. Shirey*, in which the Supreme Court determined that it was a violation of public policy for an employer to terminate an at-will employee for filing a workers' compensation claim, the majority of the Superior Court reasoned, "[i]f we accept [Rothrock Motor Sales'] argument that [Rothrock] does not have a cause of action for wrongful discharge, our decision would, in effect, allow employers to engage in prohibited conduct through their supervisory employees. Consequently, we are inclined to carve out an exception to the employment-at-will doctrine to deter such behavior."

The majority's decision was not without criticism from several of its fellow judges. A tersely worded dissent noted that, "[p]ublic policy has, to date, been strictly limited to protecting the employee who files the workers' compensation claim, and I am not persuaded that the narrow exception to the doctrine of at-will employment should be extended to co-workers, even one who is related to the injured employee as was the case here."

Based on this decision, at the minimum, employers will now be subject to possible monetary damages for the termination of an employee based on his or her refusal to persuade a co-employee from pursuing a workers' compensation claim. It also means that employers may be subject to wrongful discharge claims based upon peripheral circumstances surrounding a workers' compensation injury. Only time will tell whether it causes a rash of litigation for such issues as failing to support management's position in workers' compensation matters, claims for disability benefits, or allegations of sexual harassment. Prior to any terminations, an employer's decision should be closely scrutinized for a potential wrongful discharge claim. 