LEGAL EAGLE EYE NEWSLETTER

January 2024 — *For the Nursing Profession* — Volume 32 Number 1

Verbal Abuse Of Caregivers: Medical Center Not A Public Forum, No Freedom Of Speech.

A patient at a Veterans Administration facility was displeased with his respiratory therapist's diagnosis that he did not have sleep apnea. He felt that diagnosis could negatively impact his claim for disability benefits.

He responded with aggressive verbal abuse directed at his caregiver which included multiple usages of the "F" word.

He repeated the same behavior toward hospital security officers who were summoned by the caregiver.

He was arrested and charged with and convicted of two counts of disorderly conduct and ordered to pay a $500 fine.

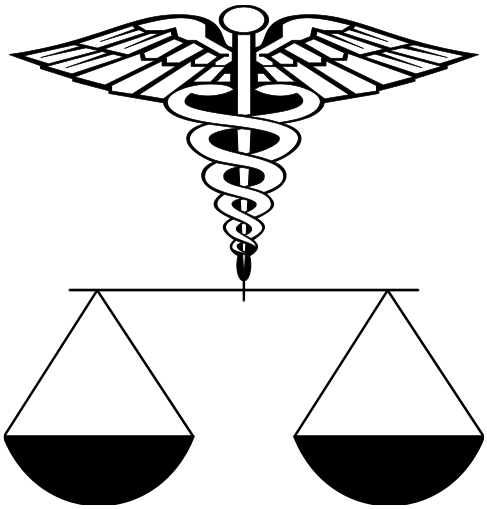
He appealed his conviction on the alleged grounds that his First Amendment Constitutional right to Freedom of Speech permitted him to express his feelings toward his caregivers, and that his arrest and criminal conviction for doing so were unconstitutional and therefore null and void.

No Constitutional Rights Violation

The US Court of Appeals for the Seventh Circuit (Wisconsin) disagreed and ruled his conviction will stand.

According to the Court, the level of scrutiny for a court to evaluate any restriction on free expression depends on the nature of the location where the expression occurred.

That the expression occurred on property owned and controlled by a governmental entity is not the last word.



Freedom of Speech does not apply to every form of expression equally in all places and at all times.

Individuals do not necessarily have the right to express themselves on every type of government property without regard to the nature of the property and the disruption that might be caused by the speaker's actions.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT
December 14, 2023

On one end the spectrum are open spaces traditionally devoted to free expression of ideas by the public. Free speech cannot be restricted without a very compelling government interest.

On the other end of the spectrum are government properties that are not devoted to the free expression of ideas, but are designated and reserved for other purposes.

An example of an open space might be a public sidewalk. A contrary example might be a sidewalk from a postal service parking lot to a post office, which although open to the public, is not considered a pubic space because it is dedicated to access to the post office, not public expression.

A medical facility is not a public forum. Although owned and operated by a public agency, and open to the public, it is devoted to provision of medical care, not the public expression of ideas.

Verbal abuse of caregivers and other staff is a clear impediment to the purpose of a medical center's existence.

Therefore the governmental entity that owns and operates a medical facility has a great deal of latitude in defining and regulating conduct on the premises that the facility deems to be inconsistent with the facility's purpose as the facility sees it.

A medical facility is a place for medical care, not for free expression of opinions. **US v. Krahenbuhl, __ F. 4th __, 2023 WL 8641837 (7th Cir., December 14, 2023).**

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Patient Fall: No Proof Nurses Violated The Standard Of Care.

The patient fell in his hospital room, fractured his hip and eventually had to have hip replacement surgery.

The court record indicates he was hospitalized after a seizure at home and another seizure in a nursing facility, after apparently stopping his seizure medication.

That issue, however, appeared to have nothing to do with the outcome of the present case.

No Nursing Negligence

The Court of Appeals of Michigan was unable to find any proof of negligence by the nurse who performed the patient's admission fall-risk assessment, or the nurse who responded to the bed alarm just prior to the patient's fall.

The case reiterated two important legal principles seen in patient fall cases.

The fact means nothing in and of itself that the patient fell in a care setting. It proves nothing by way of the negligence of the patient's caregivers.

The fact does mean a great deal that the patient received a competent nursing assessment that determined correctly that the patient was mentally competent to understand, and did understand, that the patient's physical limitations made it imperative the patient get assistance from caregivers before ambulating.

In this case the nurse who assessed the patient appreciated his major fall risk, but also determined correctly the patient knew he needed assistance getting out of bed.

According to the court record, the nursing care plan included other standard measures such as all four bedrails, lowering the bed, non-slip socks, a fall-risk wristband, the bed alarm and a call bell with instruction of the patient in its use.

The nurse who responded to his bed alarm also knew or at least thought she could count on this patient staying put until she got another nurse.

The fully cognitive patient stood up and tried to walk when he knew he should not have, and that was not the nurses' fault, according to the Court.

That is an unfortunately common scenario in patient fall cases, which routinely results in a no-liability ruling for nursing caregivers. **Drake v. Hospital, 2023 WL 8664128 (Mich. App., December 14, 2023).**

The patient's case against the hospital had no other evidence than the patient's hip fracture was caused by his fall in his hospital room.

Without proof of negligence by the hospital's nurses, that is not enough for a successful lawsuit.

The hospital's evidence in its defense was that there were proper fall precautions in place.

A nurse responded by going to the room promptly when the bed alarm alerted them that the patient was trying to get out of bed.

The nurse told the patient to stay put in bed while she went to get the patient's nurse to help her.

The patient had been assessed as fully cognitive.

He agreed to stay put while the nurse was just outside the door of his room trying to get the other nurse.

Then the patient suddenly stood up and tried to walk to the bathroom on his own.

There is no case of negligence against the nurse assigned to the patient who did the correct fall-risk assessment, or against the nurse coworker who responded to the bed alarm when the patient's nurse was occupied in another patient's room on the same corridor.

COURT OF APPEALS OF MICHIGAN
December 14, 2023

Patient Fall: No Proof Nurses Violated The Standard Of Care.

The patient, who weighed nearly three-hundred pounds, had to go to the kidney center for his dialysis.

That morning his knees and legs gave out while walking from his house to his truck. His wife was able to get him up and into the truck. Then the wife phoned ahead to the kidney center to let them know the patient was having trouble ambulating.

At the kidney center the wife and the nurses were able to get him out of the truck and into a wheelchair.

Inside the center the nurses decided not to try to move him from the wheelchair into a dialysis chair. Instead they phoned the local fire department to get two firefighters to come and move him.

The firefighters got him up, then tried to let him drop into the dialysis chair, but he ended up on the floor.

In and of itself, the fact the patient ended up on the floor does not prove nursing negligence.

The question is whether the nurses' judgment and their actions violated the applicable standard of care.

In this case there is no evidence of a lack of good judgement by the nurses.

UNITED STATES DISTRICT COURT
ALABAMA
December 18, 2023

The US District Court for the Middle District of Alabama dismissed the dialysis center from the case.

The issue was not whether the firefighters dropped the patient, but whether the nurses showed unprofessional judgment getting the firefighters to move their bariatric patient rather than attempting that themselves. On that issue there was simply no evidence of nursing negligence. **Holmes v. Kidney Center, 2023 WL 8719447 (M.D. Ala., December 18, 2023).**

Shooting On The Premises: Hospital Did Not Have Reason To Consider Intruder Dangerous.

The Supreme Court of Missouri recently threw out a verdict of $1.5 million against a hospital, awarded to a hospital visitor who was shot with his own gun by an intruder in the hospital parking lot.

The victim drove to the hospital when he learned that his daughter had been taken to the emergency room. He parked in the hospital parking lot. His driver's side door did not lock, but he did activate the alarm that did work.

He left his pistol in the center console.

Meanwhile an individual who had originally accompanied her boyfriend to the emergency room was wandering around the parking lot.

She asked for a ride from one patron who came out and got in his car. Then she found a car that was unlocked and sat in it for about an hour.

When she left that car she took with her a pharmacy order of some pills the owners had left in the car.

After the owners returned they went back inside to report to the emergency department desk their medications had been stolen. The police were called and the theft victims reported their property had been taken from their car.

Finally the shooting victim was shot when he came back to his car with the individual in it who had discovered his gun.

The only issue in the case is whether the hospital knew the shooter was dangerous, based on a complaint from two patrons to the emergency department front desk that someone had stolen from their car in the parking lot.

The hospital could not reasonably foresee that an individual who had been acting out erratically in the parking lot would use the victim's own gun from the victim's own car to shoot the victim.

A business owner does not have a legal duty to protect patrons from a person on the premises unless there is reason to suspect the person of a potential for violence, and the business owner has the time and the capability to avert the threat, and fails to do so.

The jury verdict for the shooting victim must be thrown out.

SUPREME COURT OF MISSOURI
December 19, 2023

For the Court, the whole point of reiterating the entire sequence of events was that at no time did the hospital have reason to believe that a person capable of violence toward others was a threat.

The individual had been acting out erratically and committing crimes of vehicle burglary and theft, but never acted out in a way that suggested violence.

She happened to pull out the victim's gun when he confronted her in his car, and shot him on the spur of the moment with a weapon that was not her own.

Duty to Protect Patrons From Foreseeable Acts of Violence

As stated by the Court, the touchstone for the creation of a legal duty in this context is foreseeability.

An owner of commercial premises is under no duty of care unless and until the owner knows or has reason to believe that violent acts of an uninvited person or persons are occurring or are about to occur.

Legally the alleged victim has the burden of proof that a violent act is about to occur. The business owner does not have to prove the negative premise to escape legal liability if the alleged victim has no evidence for a prima facie case.

Even if the hospital was on notice that someone was burglarizing cars in the parking lot, that is basically not a violent act that would tend to progress to more violence, in the Court's opinion.

It is not true that any criminal act on the premises puts the owner on notice of possible violence. **Harner v. Joplin, __ S.W. 3d __, 2023 WL 8790112 (Mo., December 19, 2023).**

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Workplace Grievance: Union Did Not Deny Fair Representation.

A minority who worked as a CNA in a nursing home believed her employer was discriminating against her because of her race.

In court later on the CNA was pressed for an explanation. The only evidence she could offer was that she is a minority and her supervisor was white. Her race discrimination lawsuit against her employer went nowhere.

The CNA also sued her union, claiming that she was denied fair representation by the union as to her grievance over alleged racial bias by her supervisor.

No Failure of Fair Representation

The US District Court for the Southern District of New York agreed in principle that union employees have the right to expect fair representation by their union as to grievances against the employer.

The union cannot ignore a meritorious grievance or pursue it only perfunctorily.

However, in this case the union representative did investigate the grievance and did schedule a meeting involving the employee, a union representative and a representative from the employer.

The meeting was to be held via Zoom online computer software, rather that face to face.

The union agreed to help the employee download the software, install it and get it up and running.

In the alternative, the union rep agreed to have the employee come to the union's office for use of the union's computer equipment, and even spelled out the public transportation the employee could use to get there for the meeting.

The employee simply did not show up for the Zoom session. For the Court that was the last straw. The union did all that could be expected to fulfill its duty of fair representation of this employee.

The Court went further to rule the union did not retaliate against the employee for advocating for decertification of the union as the nursing home employees' bargaining agent.

Decertification is an issue to be taken up with the National Labor Relations Board, not directly with the employer. **Phillips v. Care Center, 2023 WL 8452424 (E.D. N.Y., December 5, 2023).**

When an employee claims the union did not provide fair representation as to a workplace grievance, the court looks to whether the union's handling of the matter was arbitrary.

Arbitrary means the union ignored or only perfunctorily pursued a meritorious grievance.

The union does not act arbitrarily when it refuses to take up a grievance that is not meritorious, or acts negligently rather than intentionally, for example, by erring in evaluating the true merit of a grievance.

The employee can sue the union if the grievance had merit, the union was aware of the grievance and the union's conduct in failing to take up the grievance properly was arbitrary.

This employee was dissatisfied with the union's status as bargaining agent. She submitted a petition to her employer that the employer refuse to deal further with the union as bargaining agent.

However, that is not an issue that an employee takes up with the employer.

Processes exist for an employee dissatisfied with the current union to petition the National Labor Relations Board to initiate the decertification process.

UNITED STATES DISTRICT COURT
NEW YORK
December 5, 2023

Patient Fall: Court Discusses Nurse's Role As Expert Witness.

An individual came with his family to an urgent care clinic and was placed on a gurney to wait to be seen by a doctor.

The family alerted the nurses that the patient seemed to be sliding off the gurney.

The nurses did nothing in response, when it would have been a simple matter to raise the bedrails to keep the patient from falling off.

The patient did fall and broke his arm. The fracture was clearly verified by x-rays.

He later would claim in his lawsuit that there was also a closed head injury and an injury to his hip. CT scans right after the incident, however, showed no evidence of a head or hip injury.

The patient's nursing expert is fully qualified to testify as to the standard of care for attending to an individual with balance issues lying on a gurney in an urgent care clinic.

The nurse has only a limited role in assessing and diagnosing the injuries caused by the fall off the gurney.

COURT OF APPEALS OF WASHINGTON
December 4, 2023

The Court of Appeals of Washington ruled the patient's nursing expert could testify as to a breach of the standard of care by the nurses not assessing their patient's fall risk, not listening to the family and not raising the bedrails.

The nurse could also testify that the broken arm was a result of the fall, even though not a radiologist or orthopedist. The fracture was competently diagnosed by the physicians right after the fall.

However, the patient's claim of head and hip injuries was dismissed because his nursing expert was not qualified to make a diagnosis or dispute the medical data. **Langholt v. Hospital, 2023 WL 8372395 (Wash. App., December 4, 2023).**

Discrimination, Retaliation: Court Says Minority Nurse Can Sue.

A confrontation occurred on a nursing unit in an adult care center between two groups of nurses.

One group included only Caucasian nurses. The other group were African American and Hispanic nurses. The court record only elaborated in general terms that the minority nurses were complaining about unequal treatment.

After the incident all of the minority nurses were written up for disciplinary violations, and none of the Caucasians.

Several of the minority nurses were threatened with reprisals if they spoke up in the ensuing civil service hearing in support of their side in the incident.

One particular Hispanic nurse found herself transferred involuntarily to another unit, then threatened with termination if she persisted in her advocacy.

The minority nurse resigned her position rather than being fired.

However, when that happens under a threat of dismissal on grounds that are not appropriate, the resignation is deemed a constructive discharge.

Constructive discharge has the same force and effect as actual termination for purposes of antidiscrimination law.

UNITED STATES DISTRICT COURT
NEW YORK
December 20, 2023

The US District Court for the Southern District of New York ruled the Hispanic nurse has grounds to sue.

The statute of limitations had run on the discriminatory handling of the incident.

However, still alive was the right to sue for the retaliation that came afterward in the form of forced resignation. **Cruz v. Care Center, 2023 WL 8810144 (S.D. N.Y., December 20, 2023).**

Spanish Accent: Problems With Communication, No Race Bias.

There is no evidence here from which a jury could conclude that racial discrimination had anything to do with the employee feeling she was being forced out of her job.

Even if the supervisor did complain about the employee's Spanish accent, there is nothing improper about a supervisor making an honest assessment of an employee's oral communication skills, when such skills are reasonably related to effective job performance.

There is a difference between accent-related comments being related to the employee's background, as opposed to the employee's ability to do the job.

A language barrier can cause difficulties in the workplace, and taking a language barrier into consideration does not necessarily imply discrimination.

An employee's subjective feeling of harshness or unfairness does not prove discrimination, in the absence of other corroborating evidence.

It is further problematic that this employee never lodged a complaint that her rights were being ignored in violation of the employer's human rights policies, before she made the decision to resign her position.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
December 11, 2023

An individual who was born in Puerto Rico and has Spanish as her first language was hired by the hospital as a clinical services associate.

The position entailed extensive interaction and communication with patients and clinicians.

At the time of her hiring her Spanish-language fluency was considered a valuable asset that would bolster the institution's ability to respond to the needs of its Spanish speaking patients.

During her stay she received positive performance reviews as to her teamwork, work ethic and caring attitude.

Only her verbal communication skills were found not up to par, because of her Spanish accent.

Ongoing comments from her supervisors about her accent were taken by her as derision based on her race and background. She decided to make a salary demand she knew would not be accepted, then resigned when it was refused.

No Discrimination

The US District Court for the Eastern District of Pennsylvania ruled that English language proficiency for a patient-care position is a legitimate expectation which a healthcare employer can insist upon.

The Court pointed to a legal case precedent involving a physician from India. Even though the physician was fluent in the English language, which is spoken extensively in India, his accent was deemed an impermissible barrier to effective communication with his employer's patients that precluded him from continuing his employment in the emergency room.

A healthcare worker's ability to communicate effectively with patients and colleagues is essential.

In the present case the employer at first welcomed the new employee with a Spanish language background, until actual experience in the workplace gave an objective basis to find her background a detriment rather than an asset.

Initially welcoming her to the institution to help with Spanish speaking clientele tended to negate the idea that the institution had any bias toward Spanish speaking persons. **Melendez v. Hospital, 2023 WL 8548663 (E.D. Penna., December 11, 2023).**

Home Health: Lab Not Specified By Physician, Nurse Can Be Liable.

A complicated medical malpractice case was filed by the family of a now-deceased patient.

The patient was initially treated for a foot injury, then treated for infection of the wound on the foot, then treated for sepsis from the infection and ultimately treated for renal failure related to the sepsis.

Among the list of defendants in the family's civil lawsuit is the home health nurse who cared for the patient during the course of his renal disease that immediately preceded his passing, and the nurse's home health agency.

As to the nurse, one allegation is that she failed to report to the physician as to the patient's deteriorating condition.

The other allegation is that the nurse failed to clear with the physician which lab would be used for the patient's blood samples and the urgency to be conveyed to the lab of getting the results back.

The Court will accept the opinion of the deceased patient's family's nursing expert that it is a responsibility of a home health nurse to inquire with the physician as to the choice of a laboratory for the patient's blood samples, and the level of urgency that should be conveyed to the lab in getting the results back to the physician.

NEW YORK SUPREME COURT
APPELLATE DIVISION
December 20, 2023

The New York Supreme Court, Appellate Division, agreed with the family's nursing expert that a home health nurse should confer with the patient's physician as to the choice of a laboratory for the patient's blood, and can be liable if that failure is proven to have harmed the patient. **Alvarellos v. Tassinari, __ N.Y.S. 3d __, 2023 WL 8792313 (N.Y. App., December 20, 2023).**

Hypertensive Crisis: Court Sees No Liability For Nurse Practitioner.

The patient went to the medical center's outpatient ear nose and throat clinic for an earache.

The nurse practitioner removed some earwax and discharged the patient.

Prior to discharge the nurse practitioner got a blood pressure of 233/150. The nurse practitioner later claimed she told the patient to go to the emergency room on campus, but there was no documentation of that.

Nine days later the patient had a hemorrhagic stroke.

The legal case against the nurse practitioner for allegedly failing to send the patient to the E.R. is flawed.

The case requires proof that the patient would have gone to the E.R.

The case requires further proof that, if she went to the E.R., the E.R. staff would have detected an impending vascular event and would have undertaken treatment that would definitely have staved off an aortic aneurysm.

DISTRICT COURT OF APPEAL
OF FLORIDA
December 13, 2023

The District Court of Appeal of Florida dismissed the case.

Regardless of the nurse practitioner's lack of wisdom not sending the patient to the emergency room, if that is what happened, the proof is too speculative that that action would definitely have prevented the patient's stroke nine days later.

A legal case requires solid proof of cause and effect linking negligence to the harm suffered by the patient. Even if negligence occurred, and the patient had a bad outcome, the link must still be proven. **Fertil v. Hospital, __ So. 3d __, 2023 WL 8608634 (Fla. App., December 13, 2023).**

Hospital Waiting Room: Wheelchair Not Unreasonably Dangerous.

A patient filed a lawsuit claiming he was injured while at the hospital for his first prostate cancer treatment in the radiation oncology department when he fell trying to sit in a wheelchair after checking in in the waiting area.

He claimed the wheelchair was three to five feet from the wall and suddenly rolled backward when he tried to sit.

He alleged that there should have been warning signs posted, as if it was not open and obvious that the wheelchair had wheels and could roll on the floor.

There is no evidence the hospital had any actual or constructive notice of a problem with the wheelchair positioned up against the wall in the radiation oncology waiting room.

COURT OF APPEAL OF LOUISIANA
December 20, 2023

The Court of Appeal of Louisiana dismissed the case.

A wheelchair sitting in a hospital waiting area is not an unreasonably dangerous condition of the premises.

The patient claimed the wheelchair was three to five feet out from the wall when he tried to sit in it.

During the pendency of the case, the hospital submitted a declaration from a long time employee that the chair was in the corner up against the wall when the patient allegedly fell, and it had been in that position for many years without any incident involving patient safety.

When the patient, after he was the plaintiff in a lawsuit, was shown photos taken that day of the wheelchair against the wall, he changed his story and claimed that was the way it really was that day.

Changing the story in the middle of the case did not impress the Court. It was right to dismiss the patient's case. **Williams v. Hospital, __ So. 3d __, 2023 WL 87998466 (La. App., December 20, 2023).**

Unfair Labor Practice: Pro-Union Nurse Fired For Leaving O.R.

A circulating nurse left the operating room for twenty-eight minutes during a surgical procedure without getting another to take her place.

The nurse was at that moment serving as preceptor to a relatively new nursing hire who was orienting to circulate without supervision. He remained in the room in the capacity of circulating nurse the whole time his preceptor was absent.

She left to join a group of nurses from the surgical department who were set to meet with the hospital's chief nursing officer about union-related business.

After the incident the circulating nurse was fired for alleged patient abandonment.

The nurse filed a complaint with the US National Labor Relations Board.

The Board ruled the nurse was the victim of an unfair labor practice meant as retaliation for taking care of business for the union by attending the meeting with the chief nursing officer.

The Board ordered the hospital to reinstate the nurse with back pay.

The US Court of Appeals for the Second Circuit (New York) upheld the Board and dismissed the hospital's appeal.

No Violation of an Established Policy

The Court pointed to the fact the hospital had no written guidelines defining the responsibilities of a nursing preceptor.

There was no written standard at the hospital to define when a preceptor could hand off sole responsibility to an orientee and leave the orientee working alone.

Customary practice at the hospital was to leave the issue entirely to the judgment of a nursing preceptor when to leave an orientee alone. The nurse in this case had reason to believe her orientee was capable of working alone and knew how to do so and would ask for help if he needed it.

The telling point against the hospital's legal position was that another circulating nurse preceptor had left the same orientee alone in the operating room for an extended time just one week before, and received no discipline or even a hint of criticism.

The only difference was that that individual was not connected with the union, as was the nurse in this case. **Hospital v. NLRB, 2023 WL 8715731 (2nd Cir., December 18, 2023).**

Differential discipline of one employee, who has some sort of legal protection, compared to another, for the same alleged misconduct, opens the door to a claim of discrimination or retaliation.

The nurse in this case has a good argument that the hospital's explanation for her termination is only a pretext for retaliation for her active participation in union business.

True, a circulating nurse is not supposed to leave the operating room without replacement coverage.

However, there was another circulating nurse in the operating room, albeit a new hire still orienting.

The hospital has no fixed parameters, leaving it to the preceptor's judgment, when an orientee is ready to work alone in the operating room without the preceptor or a more seasoned circulating nurse present.

It was also true that another preceptor who was overseeing the same orientee only a week before had been seen outside the operating room for an extended time while the orientee was alone in the room.

That nurse was not fired, disciplined or even given a hint that her action was questionable.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
December 18, 2023

Arbitration: Wife Had No Authority To Agree On Patient's Behalf.

The elderly patient fell multiple times over a three-month stay in a nursing facility, before his wife had him moved to another facility where he resided briefly before he passed.

At this time the legal issue is whether the legal claims of the surviving wife and five adult children should be referred to binding arbitration or left on the local superior court's docket for jury trial.

A spouse does not have authority to agree to arbitration of a patient's future legal claims merely for being the patient's spouse.

No such authority comes from the spouse being named as a surrogate decision maker for healthcare decisions.

Arbitration pertains to the patient's right to sue for malpractice, which is a property right or personal asset, for which a power of attorney is required for another person to sign away.

CALIFORNIA COURT OF APPEAL
December 13, 2023

The California Court of Appeal ruled the arbitration agreement was null and void, not having been signed by the patient or someone with proper legal authority.

The Court expressly rejected the idea that the surviving spouse who signed the arbitration agreement was precluded from benefitting by arguing that what she signed was null and void. She never had any legal authority to sign and that was that.

The Court also reiterated the principle that a spouse, as the spouse and nothing more, does not have authority to consent to arbitration on a patient's behalf. **Harbaugh v. Nursing Home, 2023 WL 8613559 (Cal. App., December 13, 2023).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Nurse Found Contraband In Patient's Clothing: Patient's Rights Not Violated.

The patient was brought by ambulance from the emergency department at another hospital for admission to the hospital's ICU.

When he arrived he was already dressed only in a hospital gown from the first hospital, and his clothes were brought with him.

The ICU nurse began the hospital's standard process for admission to the ICU. That included documenting the patient's medical history, current medications and contact information.

The hospital's standard admission process also called for the nurse to identify and document the patient's personal property. The rationales were patient and staff safety, liability concerns and an opportunity for the patient to request any valuables be placed in secure storage.

The patient was resistant and insisted his belongings not be searched. The nurse became concerned and got another nurse to assist her.

When the nurse checked the pocket on the patient's coat she found a baggie containing a white powder that was later determined to be over seventeen grams of meth. The nurse gave the baggie to hospital security who was a duly sworn police officer, not a security guard from a private company.

The officer proceeded to search the rest of the patient's clothing and found another baggie with a tenth of a gram of meth.

Nurse Not Acting as Police Agent

The Court of Appeals of Indiana accepted the nurse's testimony that she acted solely in accord with hospital policy meant to protect patients and staff and had no intention to serve law enforcement.

The patient's rights were not violated by the nurse as to the discovery of the first baggie or its seizure by the police and use as evidence against the patient in his criminal trial. Conviction for Level 4 Felony Possession will stand.

However, as to the second baggie, the patient's rights were violated by the officer and the second baggie should not have been admitted as evidence.

Finding contraband in a legitimate healthcare related search of the patient's belongings did not create an exigent circumstance that justified the police officer going ahead further without a search warrant for the rest of the patient's clothing.

A search warrant probably could have been obtained on the basis of the contraband found innocently in the nurse's search, but that was not done. **Defendant v. State, 2023 WL 8232907 (Ind. App., November 28, 2023).**

Pressure Sores: DON In Long Term Care Not Accepted By Court As Family's Expert Witness.

The patient developed pressure sores that progressed to decubitus ulcers that eventually became necrotic and infected and required antibiotic therapy and surgical debridement.

After his passing, his family, through his probate estate, sued the long-term care facility for alleged negligence blamed squarely on the nursing staff.

State law in Michigan, as in many states, requires an affidavit from an acceptable expert witness attesting to the merits of a healthcare malpractice case be filed with the court papers.

For their expert witness the estate's lawyers had an affidavit from a registered nurse who served as director of nursing in a long-term care facility.

The affidavit was challenged by the defendant care facility as insufficient to meet the requirements of state law.

The state statute requires an expert witness in a healthcare malpractice case to be currently engaged in active clinical practice in the relevant field, or active in instruction in the field.

The director of nursing's position in a 150-bed long term care facility is exclusively administrative.

The position does not involve active clinical practice caring for patient's skin integrity issues.

COURT OF APPEALS OF MICHIGAN
December 14, 2023

The Court of Appeals of Michigan agreed with the defendant care facility that the affidavit of a director of nursing does not meet the requirement that an expert witness in a healthcare malpractice case must be engaged in active clinical practice.

Oddly, the probate estate's lawyers were given the option of finding another nursing expert who would be acceptable under the statutory guidelines. They electing instead to wait for the lower court judge to reconsider and reverse the ruling excluding the director of nursing as an expert, which the judge never did.

At some point a court will no longer wait for compliance, and will rule against a party with extreme prejudice, who does not follow the rules. Compliance allowed at too late a juncture in the course of litigation can be prejudicial to the other side. **Snead v. Estate of Williams, 2023 WL 8660993 (Mich. App., December 14, 2023).**