LEGAL EAGLE EYE NEWSLETTER

May 2024 *For the Nursing Profession* Volume 32 Number 5

Emergency Room: Court Expects Nursing Leadership To Set Standard For Patient Care.

In a potentially far-reaching decision, the Supreme Court of Washington recently eroded the conventional legal wisdom that allows hospitals in many cases to escape liability in cases of negligence by independent emergency physicians.

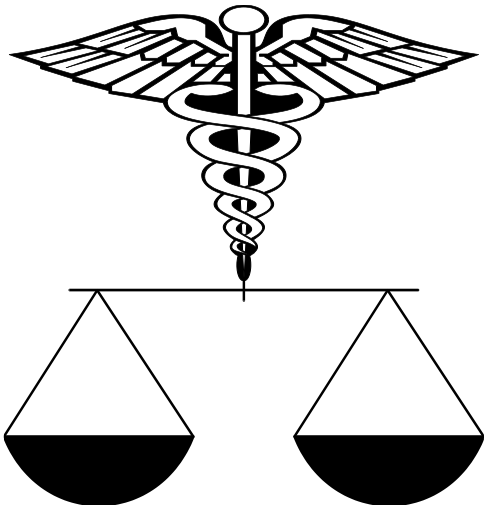
The conventional legal wisdom allows hospitals to defend themselves from liability for the errors or omissions of non-employee physicians in the emergency department by proving that the physicians are non-employee independent practitioners and that the patient was informed, knew and agreed to be treated accordingly.

The facts behind the decision are complex. Suffice to say the patient's necrotizing fasciitis was not diagnosed correctly until she was transferred to a higher-level facility a half day after presenting in the emergency department.

By then it was too late and she died.

The family's malpractice case against the first hospital was dismissed out of hand by the county Superior Court and the Court of Appeals on the grounds the hospital had no liability for the errors or omissions of the emergency physicians.

It was clear the emergency physicians were non-employee independent practitioners. It was also clear the hospital had taken sufficient steps to apprise the patient of the physicians' status when she consented to be treated by the non-employee physicians in the emergency department.



Existing law is not correct that a hospital is not responsible when an error or omission is committed by an independent physician in the E.R.

Hospital management, that is, hospital nursing leadership is responsible and liable for seeing that patients are shepherded through the process, notwithstanding the errors or omissions of independent contractor physicians.

SUPREME COURT OF WASHINGTON
April 11, 2024

The state Supreme Court took an entirely different approach.

The Supreme Court ruled the hospital itself had a duty of its own that could not be delegated to non-employee professionals who happened to practice there.

The Supreme Court looked to two sources for the authority for its ruling. One source was a physician who testified as an expert witness for the family.

The other source authority was the state's Nurse Practice Act and supporting regulations.

Hospitals have a legal duty to establish and guarantee minimum standards for patient health and safety.

How that duty is effectuated, according to the Supreme Court of Washington, is by the hospital establishing solid standards for nursing leadership within the institution, starting with an executive level nurse in charge of formulating and enforcing standards for patient nursing care.

The facts of the present case did indicate the nurses did not report troubling signs to the physicians.

The nurses were not held responsible for negligently practicing medicine by failing to diagnose necrotizing fasciitis.

However, that fact did tend to show, in the Supreme Court's judgment, a systemic failure of nursing leadership. **Estate of Essex v. Hospital, __ P. 3d __, 2024 WL 1562873 (Wash., April 11, 2024).**

Inside this month's issue...

May 2024

New Subscriptions See Page 3

Needle Left Inside Patient: Court Faults The Physicians, But Not Hospital's Circulating Nurse.

The surgical team for the patient's total knee replacement surgery included the surgeon, a surgical technician and the circulating nurse.

The surgeon was an independent practitioner with privileges at the hospital.

The surgical tech was an independent contractor who worked for various surgeons on a case-by-case basis, and was called in for this case by the surgeon.

The circulating nurse was an employee of the hospital.

At the final count by the surgical tech and the circulating nurse one needle could not be accounted for. The circulating nurse informed the surgeon, and the surgeon ordered an intraoperative x-ray to locate the needle.

Two radiologists, independent practitioners, read the x-ray and could not locate the needle. Then the surgeon decided to give up the search for the needle and deem the case completed.

As things were transpiring, the circulating nurse documented that the needle count was incorrect, that she so informed the surgeon, that an x-ray was obtained and read inconclusively and that the surgeon abandoned the search for the needle.

Weeks later the patient complained of persistent pain in her knee. A new surgical procedure found and removed the needle.

Circulating Nurse Ruled Not Liable

The Court of Appeals of Kentucky departed from the usual rule that all members of the surgical team are strictly liable when a foreign object is left inside the patient after surgery.

The Court's rationale to exonerate the circulating nurse was that she did everything expected of a circulating nurse, a needle count that correctly revealed that the needle count was not correct, and candid documentation of that and all that followed, including failure to find the needle.

The legal doctrine of res ipsa loquitur is the usual technical basis for liability in these cases. However, in this case the that did not apply to the circulating nurse who never had control of the needle in question. **Lloyd v. Hospital, __ S.W. 3d __, 2024 WL 1685440 (Ky. App., April 19, 2024).**

The circulating nurse was the only person in the operating room who was a hospital employee, the only person for whose errors and omissions, if any, the hospital would be liable.

The circulating nurse participated in the needle count that found that a needle was missing, so informed the surgeon and charted that the needle count was not correct.

The circulating nurse also charted the efforts to locate the missing needle before those efforts were given up and the surgeon deemed the case completed.

The legal doctrine of res ipsa loquitur (It speaks for itself) does apply to the other members of the surgical team, but not the circulating nurse.

The needle was never in the control of the circulating nurse. Exclusive control of the instrumentality of harm to the patient is a necessary factor for res ipsa loquitur to apply.

There was no other evidence to create an inference of individual fault by the circulating nurse.

The circulating nurse was not implicated in any expert opinion submitted on the patient's behalf.

COURT OF APPEALS OF KENTUCKY
April 19, 2024

Non-Employee Physician: Form Patient Signed Was Ambiguous.

The patient was sent to the ICU after his knee replacement surgery due to problems with his pulmonary status that were not specified in the court record.

After three weeks in the ICU the medical director of the ICU had him transferred to a medical/surgical floor.

Two days later he was found unresponsive in his bed and declared dead.

Through their probate administrator the family sued the physician director of the ICU as well as the hospital.

Although the physician was not a hospital employee, but an independent practitioner, the lawsuit alleged the hospital was responsible for his errors or omissions.

The patient signed a consent form for his surgery that explained that some of the physicians practicing at the hospital are not hospital employees.

If some of the physicians are not hospital employees, that leaves open the possibility that some of them are hospital employees.

The patient had no way to know if the chief of the ICU was an employee or an independent practitioner.

COURT OF APPEALS OF MICHIGAN
April 11, 2024

The Court of Appeals of Michigan let the case go forward against the hospital despite the fact the physician was technically not a hospital employee.

The patient signed standard paperwork agreeing to be treated in the hospital by the physicians at the hospital, some of whom were independent practitioners.

However, the patient had no way of knowing whether the ICU director was or was not a hospital employee. **Kowalski v. Hospital, 2024 WL 1597607 (Mich. App., April 11, 2024).**

Workers Comp: Caregiver Disabled By Reports Of Client's Crime.

A social worker worked as a case manager for the county's adult mental health case management agency.

She was assigned to a client who should have been referred to the forensic unit where the caregivers had special training dealing with individuals who had mental illness and a propensity for crime.

One day she received a phone call that that individual had brutally murdered his wife. The person on the phone shared the grisly details of the crime.

The social worker began to experience somatic and psychological symptoms of post traumatic stress, for which she sought workers compensation for time off work.

Court Upholds Right To Benefits

The Supreme Court of Minnesota ruled in the social worker's favor, discounting the employer's argument that her condition did not exactly fit the DSM criteria for Post Traumatic Stress Disorder.

The DSM says the traumatic event must happen to the examinee or a close family member. The Court ruled the workers comp judge could still find her disabled notwithstanding the strict DSM guidelines. **Respondent v. County, __ N.W. 3d __, 2024 WL 1644800 (Minn., April 17, 2024).**

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Suicide By Cop: Court Finds No Evidence Patient's Remark Should Have Been Taken Seriously.

The court record does not support a finding that the patient attempted to or threatened to commit suicide by cop.

He merely remarked, then took it back, that he might have been better off if the police had just shot and killed him rather than bringing him to the hospital for a mental health evaluation and treatment.

For involuntary detention for medical treatment and possible involuntary medication, there must be at least a credible threat, or a feasible plan or an actual attempt at suicide to justify a court order for involuntary mental health commitment on grounds of danger to self.

The patient cannot be medicated involuntarily without an underlying order for involuntary mental health commitment.

COURT OF APPEALS OF WISCONSIN
April 16, 2024

A usually homeless individual was arrested by the police for disorderly conduct at a motel where he was staying.

While in jail the police were worried about his bizarre and combative behavior and talk about vampires and werewolves.

A social worker had the police take him to the hospital in handcuffs. While being assessed in the emergency department he blurted out that he might have been better off if the police had just shot and killed him.

Based on that remark showing alleged danger to self he was taken to a locked psychiatric facility. Even though on his second day there he denied all suicidal ideation, a six-month involuntary commitment was ordered for him.

Court Overturns Involuntary Commitment Order

The Court of Appeals of Wisconsin did not discount the patient's psychiatric diagnoses of schizoaffective disorder and intellectual developmental delay. It was undeniable that the patient had a serious mental illness.

However, the law requires that the patient be gravely disabled or a danger to self to justify involuntary commitment, which was not to be found here.

The Court looked to the fact the patient denied suicidal ideation and had no actual plan for suicide by cop to occur or a history of an overt attempt to harm himself by that or other means. **Commitment of C.R.J., 2024 WL 1635619 (Wisc. App., April 16, 2024).**

Patient Assignments Based On Race: Home Health Agency Must Answer To Minority Nurses.

A home health and hospice agency adopted a policy to honor clients' requests for "Caucasian only" caregivers.

The nursing assignment sheets had a space dedicated to noting the patient's choice of their assigned caregiver's race.

Patients' choices were always honored when a Caucasian nurse was on tap, and a Caucasian nurse was called in specially if one was not and the patient insisted on one.

Two African-American nurses who worked for the agency challenged their employer's policy as discriminatory in violation of Title VII of the US Civil Rights Act.

Court Sees Discrimination Requires Adverse Employment Action

The US District Court for the Middle District of Florida saw the employer's policy and practice clearly discriminatory to honor "Caucasian only" caregiver requests.

However, to have standing to sue in Federal court the nurses must be able to prove they were harmed by their employer's policy and practices.

It is not enough to have been offended, or that the employer's policy was morally wrong or legally impermissible.

The person complaining of employment discrimination must be able to prove adverse employment action.

That means that the terms and conditions of their employment were affected in a negative way, as to compensation, promotion or working conditions.

At this stage the Court did not have solid evidence from the nurses that their compensation or working conditions were actually affected in a demonstrable way.

However, at this stage in the litigation the Court does not need conclusive evidence, but only a realistic assertion that such evidence exists and will be forthcoming, to defeat the employer's petition for a judgment of dismissal for failure to state a claim for which legal relief can be granted.

The Court indicated the case could end up being dismissed, notwithstanding the wrongfulness of the employer's conduct, if proof of actual loss is not forthcoming at trial. **Brewer v. Health, 2024 WL 1579674 (M.D. Fla., April 11, 2024).**

As a rule an employee or former employee cannot sue the employer in Federal court for a civil rights violation unless the employee or former employee can prove adverse employment action motivated by discriminatory intent by the employer.

Adverse employment action as a prerequisite for a lawsuit means an employee cannot sue simply to challenge a policy or practice to which the employee objects as racially discriminatory.

To have standing to sue in Federal court an employee must be able to prove adverse employment action by the employer.

Not every unpleasant or trivial slight will suffice as adverse employment action for purposes of antidiscrimination litigation.

The employee must have suffered actual, demonstrable harm.

In this case the minority nurses have alleged and are prepared to prove that their earnings were affected, by being passed over for available assignments they were fully capable of fulfilling, which were reserved unfairly for white nurses based on their employer's intent to honor "Caucasian only" patient caregiver requests.

UNITED STATES DISTRICT COURT
FLORIDA
April 11, 2024

Gay Nurse: Being Brunt Of A Joke Does Not Create A Hostile Work Environment.

A gay registered nurse found out that his want of a Texas-style masculine demeanor was the brunt of a joke at a staff meeting where he was not present.

The remark caused considerable laughter among his coworkers who were present at the meeting.

Afterward the nurse felt that the atmosphere of mutual respect he once enjoyed on the job was now gone.

He quit his job. Then he filed suit against his former employer for constructive discharge. Constructive discharge is legal parlance for an employee not being fired, but quitting based on unacceptably hostile treatment on the job.

Title VII of the US Civil Rights Act does not establish a code of civility.

Unpleasant work meetings, verbal reprimands, improper work requests and unfair treatment are not adverse employment actions that will justify an employee's resignation over a hostile work environment.

UNITED STATES DISTRICT COURT
TEXAS
April 10, 2024

The US District Court for the Western District of Texas turned down the suit.

An alleged victim of discrimination must have been harmed by adverse employment action to have standing to sue.

A hostile work environment, to qualify as such, must be so severe and pervasive as to alter the terms and conditions of employment in a way that would compel a reasonable person to leave the job.

A mean-spirited joke at another person's expense, even if based on a trait for which discrimination is illegal, is not sufficient. **Gaudette v. Hospice, 2024 WL 1558162 (W.D. Tex., April 10, 2024).**

Evidence Found Later: Relevant To Deny Employee Unemployment.

Video surveillance caught a nurse clocking in at nine in the morning and clocking out at nine in the evening.

Other than the video, there was no evidence, from other videos or coworker testimony, that the nurse was on site at any time during her alleged twelve-hour day.

When confronted, the nurse insisted she went home and worked from home all day, then went back to clock out.

Not convinced that the nurse had worked at all that day, management fired her and confiscated the laptop computer that had been furnished to her.

Then the laptop was given to a computer expert, who determined it was in sleep mode the entire time the nurse supposedly was using it to work at home.

An employer, to bolster a decision to discipline or fire an employee, can rely on relevant evidence gathered after the fact that was unknown to the employer at the time the decision was made to discipline or fire the employee.

SUPERIOR COURT OF DELAWARE
April 8, 2024

According to the Superior Court of Delaware, there is nothing impermissible about an employer using evidence that was not discovered until after a personnel decision was made concerning an employee, to justify the correctness of the decision.

The legal issue in the case was whether the nurse was guilty of misconduct that justified her termination under circumstances that made her ineligible for unemployment benefits.

Unemployment is not available to an employee who is fired for misconduct.

Falsifying employment records, submitting a time card showing a full day's work when no work was actually done, is grounds for termination. **Bishop v. Nursing Center, 2024 WL 1510583 (Del. Super., April 8, 2024).**

Hostile Work Environment: Right To Complain Is Strictly Beyond Employer Retaliation.

To succeed with a legal case of employer retaliation, the employee need not prove that the work environment the employee complained about actually was hostile to women or minorities.

The employee only needs to show that the employee had an objectively reasonable belief that specific actions by those in authority created the work environment the employee complained was inappropriate.

The US Civil Rights Act protects women and minorities from discrimination.

The Act also protects those who complain about such discrimination.

It is irrelevant whether the person is white or black or man or woman who complains about something seen as discriminatory.

A victim of alleged retaliation must show that he or she complained about something sincerely believed to be discriminatory, and afterward was disciplined or terminated because of the complaint.

The employer is allowed to argue in favor of a legitimate non-discriminatory rationale for the discipline or termination, and the court must decide.

UNITED STATES DISTRICT COURT
PENNSYLVANIA
April 9, 2024

A member of senior management at the hospital was informed her presence would be expected at an off-site management retreat.

With her invitation she was informed the entertainment arranged by the hospital CEO was a comedian know to include racist and sexist material in his act.

Before going on retreat the manager in question complained that the comedian was well known for his racist and sexist material. She also indicated she would, and others likely would be offended by having to attend and be so entertained.

The manager insisted after the retreat that the performance was offensive to minorities and women. Two months later the CEO terminated her for alleged insubordinate behavior.

Court Upholds Right To Sue For Retaliation

The US District Court for the Eastern District of Pennsylvania upheld the former manager's right to sue her former employer for retaliation in violation of the US Civil Rights Act.

The Court emphasized two important legal points.

The right to complain about a racially or sexually hostile work environment is entirely separate from the question whether the work environment actually is or was racially or sexually hostile.

The Court said that having to attend a one-time off-site performance by a politically incorrect potty-mouth comedian would not rise to the level of a hostile work environment.

However, the right to complain that it does hinges only on the complainant's sincere belief that there is a racially or sexually hostile environment, without experiencing retaliation from the employer.

Secondly, the right to complain about an issue of discrimination or hostility toward women or minorities does not hinge on the person who complains being a woman or a minority.

The only relevant fact, again, is that there was a sincere, genuine belief. **Coffman v. Health, 2024 WL 1546941 (W.D. Penna., April 9, 2024).**

Legal Malpractice: Client Must Prove Nursing Home Case Damages Were Collectible.

The daughter brought her case to the lawyer having to do with her ninety year-old mother's death.

The lawyer agreed to take the case. The lawyer noted on her office calendar of critical dates in their clients' cases that the mother died on February 15, 2015.

In fact, the mother died on February 5, 2015 hours after being taken to the hospital in an ambulance from the nursing home.

When the daughter phoned the lawyer for an update on February 9, 2017, it came to light that the two-year statute of limitations in Wyoming had passed without a lawsuit being filed.

Legal malpractice requires proof of two cases, the malpractice case against the lawyer, and the underlying case within a case that the lawyer allegedly lost due to the lawyer's neglect.

In this case the issue is whether the lawyer would have collected any damages for the client even if the statute of limitations had not run out without a lawsuit being filed.

SUPREME COURT OF WYOMING
April 22, 2024

The Supreme Court of Wyoming upheld dismissing the case.

The Court ruled that the party bringing a legal malpractice case has the burden of proof that the lawyer would have won the case the lawyer mishandled, and would have collected damages.

In this case, the nursing home's parent corporation had gone under and been dissolved and cancelled its insurance in 2016, no help even if the case had been timely filed in 2017. **Kappes v. Attorney, 2024 WY 43, __ P. 3d __, 2024 WL 1714244 (Wyo., April 22, 2024).**

Urgent Care Discharge: Patient Not Told Condition Life Threatening.

The person who discharged the patient from the urgent care clinic testified in a pretrial deposition for the patient's family's wrongful death lawsuit as to the circumstances of the patient's discharge.

The testimony was that she informed the patient that the cellulitis diagnosed in the urgent care clinic was a potentially life threatening infection, and that he needed to go to the hospital immediately for further evaluation and treatment.

Based on that testimony, the urgent care clinic obtained a physician expert's opinion that there was no deviation from the standard of care at the urgent care clinic that caused the patient's death.

It was documented that the patient was urged to go to the hospital in the next few days, but stated he would not go.

It was not documented that the person who discharged him warned him that his condition was potentially life threatening and required immediate attention at the hospital.

NEW YORK SUPREME COURT
APPELLATE DIVISION
April 17, 2024

However, the New York Supreme Court, Appellate Division, looked at the documentation and found a serious problem with the clinic's legal position.

The documentation at the time of discharge said nothing about advising the patient of the dire urgency of going to the hospital right away for further evaluation.

Only documented was an equivocal recommendation for follow up within two or three days and a prescription for antibiotics to take at home. **Glassman v. Medical, __ N.Y.S. 3d __, 2024 WL 1645296 (N.Y. App., April 17, 2024).**

Employment Discrimination: No Right To Court Appointed Lawyer.

A healthcare employee, whose job was not specified in the court record, sought to sue her former employer for discrimination and for retaliation for filing a discrimination complaint with the Equal Employment Opportunity Commission,

She successfully obtained *in forma pauperis* status which relieved her of the substantial civil filing fee for Federal court.

Then she sought to have the Court appoint legal counsel to represent her, for the same reason, that she simply could not afford to pay a lawyer.

In a civil employment discrimination case, court-appointed legal counsel is not a Constitutional right.

Appointed legal counsel is permitted by the court rules, but the primary consideration is the court's convenience in dealing with a professional who can define the issues and move things along without delay.

UNITED STATES DISTRICT COURT
LOUISIANA
April 11, 2024

The US District Court for the Eastern District of Louisiana was sympathetic and agreed to help her.

The Court insisted she try on her own to find a lawyer who would take her case on a contingent fee, where she did not have to pay up front or as the case progressed, and the lawyer would take a percentage of the verdict or settlement later on.

If that was not successful, the Court would refer her to the local Bar Association, who maintained a list of volunteer lawyers who would take cases they deemed meritorious *pro bono* for free.

In the end, the Court was authorized, but not required, to appoint a lawyer at the Court's discretion at public expense. **McPherson v. Health, 2024 WL 1573998 (E.D. La., April 11, 2024).**

Labor & Delivery: Nurse Stopped Epidural, Unable To Articulate A Safety Concern.

A registered nurse faced discipline from the State Board over her unilateral decision to stop a labor and delivery patient's epidural.

For fifteen minutes the physicians believed the epidural had become dislodged, before it was discovered a nurse had simply stopped it.

According to the nurse, who had extensive experience in labor and delivery, she became concerned for the patient's safety when the patient complained she was in pain and her legs were numb.

Hospital protocols listed stopping an epidural as the physician's sole prerogative, unless the nurse had concerns for patient safety.

The protocol for obstetric nursing specified nine distinct physical findings that could justify a nurse stopping an epidural.

The nurse was required to report to the physician immediately and identify and chart the finding behind the nurse's action.

WEST VIRGINIA INTERMEDIATE COURT OF APPEALS
April 22, 2024

The West Virginia Intermediate Court of Appeals stood by the Board of Registered Nurses' decision to impose discipline on the nurse.

In general, stopping an epidural is strictly a medical decision. A nurse practices beyond the nurse's license by making that decision unilaterally. The only exceptions are specific findings that must be reported to the physician and documented in the nursing record. **Nurse v. Board, 2024 WL 1729976 (W.Va. App., April 22, 2024).**

Medicare & Medicaid: CMS Finalizes New Regulations For Minimum Staffing Standards For Long Term Care Facilities.

The US Centers for Medicare & Medicaid Services has made available an advance copy of its new final rule on the subject of nurse staffing in long term care.

The US Centers for Medicare & Medicaid Services (CMS) new standards for nurse staffing in long term care are set to be published officially in the Federal Register on May 5, 2024.

The advance copy is available from the CMS site at https://federalregister.gov/d/2024-08273

The proposed rule from September 6, 2023 is at http://www.nursinglaw.com/CMS090623.pdf

FEDERAL REGISTER May 5, 2024

The new standards themselves begin on page 308 of the 329 page document.

The new regulations will be considered in effect upon publication on May 5, 2024.

However, implementation of the specific requirements will be phased in beginning ninety days after publication until the year 2028.

The provisions of the document are far too complex for any meaningful attempt at summarization. Affected persons unfortunately are left to wade through the document for provisions applicable to themselves and their employers and proceed accordingly.

FEDERAL REGISTER May 5, 2024

Compensation Dispute: Nurses' Class Action Dismissed.

Last month we reported the decision of the US District Court for the Middle District of Florida to hear a group of nurses' compensation disputes with their employer, joined as one class action.

See *Compensation Dispute: Court Approves Joining Nurses' Cases Into One Class Action*. (32)4 April '24 p.5.

Wages that the employer owes to the employee are not considered paid to the employee if the employee is required to kick-back some amount to the employer.

The kicked-back wages that were owed but held back and not paid could be a Fair Labor Standards Act violation if the employee's agreement to participate was not voluntary.

UNITED STATES DISTRICT COURT
FLORIDA
April 19, 2024

Having joined the individual nurses' basically identical cases into one class action, the Court has now dismissed the case as unfounded.

The employer insisted the nurses be bound by their contract to reimburse the employer out of their pay for in-service training they received, if they quit their job less than two years into the contract.

The problem with the nurses' case, as the Court saw it, was that the nurses voluntarily agreed to the pay back deduction.

Participation in the in-service training, and agreement to the pay back deduction, was completely voluntary and was not required as a condition for being hired.

The Court pointed out that only 49 of 331 nurses hired during the relevant period took advantage of the in-service and agreed to the deduction, and 282 did not. **McFalls v. Healthcare, 2024 WL 1703123 (M.D. Fla., April 19, 2024).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

Discharged Patient Refused To Leave: No Impropriety In Having Patient Arrested.

The patient came to the emergency department by ambulance after calling paramedics for a sore tooth infection causing her shortness of breath.

She was given lorazepam, allowed to rest and then discharged from care in the E.R.

The patient refused to leave. She insisted she would not leave until she was given a note for her employer that she was to take a week off work, not just one day as the physician had indicated in the note he had already given her to that effect.

Three hours went by with the patient still refusing to leave, so E.R. personnel called the local police who came and took her away under arrest for trespassing.

The Court of Appeals of Washington turned down the patient's lawsuit against the hospital. The lawsuit claimed medical malpractice and lack of informed consent in her being medicated, then told to leave. The Court pointed out that such allegations involve professional negligence and require expert proof. **Glymph v. Med. Ctr., 2024 WL 1619940 (Wash. App., April 15, 2024).**

Slip And Fall: Nursing Home Not Faulted For Urging Residents To Carry Water Bottles.

A resident of a nursing home slipped and fell on a puddle of water near the nurses station.

For her legal case against the State of New York that owned and operated the facility, she needed proof that the State, through its employees, the staff of the nursing facility, was aware of the hazardous condition before she fell and was injured.

The New York Supreme Court, Appellate Division, noted that her lawsuit offered no actual proof of prior knowledge by facility staff of the puddle on the floor. The legal case rested only on the fact she fell, which is not sufficient for liability.

The resident tried to make out a case by arguing that residents were encouraged to ambulate inside the facility, and were urged to carry their water bottles with them while they ambulated, especially the residents whose medications made them susceptible to dry-mouth and dehydration.

The Court would not accept that argument as a reason to ignore the accepted rule that actual prior notice of the hazard is required to impose liability. **Falcon v. State, __ N.Y.S. 3d __, 2024 WL 1662821 (N.Y. App., April 18, 2024).**

Arbitration: Problematic Court Rulings Point Out Necessity Of Advice From Local Legal Counsel.

Arbitration is the healthcare industry's preferred method of dispute resolution with patients and families who assert claims for compensation for professional malpractice.

Lawyers' fees are reduced in arbitration, where a few hours in a hearing could compare with several weeks in court.

Most important is the near certainty that the defendant caregiver will not be saddled with a potentially crippling runaway jury verdict.

However, a court will not order a case into arbitration over one party's objection in favor of jury trial, unless there is a valid agreement to arbitrate and forego trial.

Obtaining an arbitration agreement that can be relied upon can be problematic, as evidenced by two cases handed down the same day by different US courts in Florida and Kentucky.

Healthcare providers prefer arbitration to jury trial for resolution of legal disputes with patients and families.

However, there must be a valid pre-dispute arbitration agreement, or by default the case will stay on the court's jury trial docket.

Rules vary from state to state, so local legal counsel must be consulted for the process to turn out right.

DISTRICT COURT OF APPEAL
OF FLORIDA
COURT OF APPEALS OF KENTUCKY
April 19, 2024

In Florida, arbitration can be agreed upon by the person with the patient's durable power of attorney, but not by the patient's healthcare surrogate decision maker.

When the patient was admitted to long term care, her daughter, who held the durable power of attorney and also was the healthcare decision surrogate, signed the arbitration agreement that was contained in the admission papers, but signed on the signature line for healthcare surrogate.

In Kentucky, arbitration can be agreed upon only by the holder of the patient's durable power of attorney. However, the durable power of attorney document must expressly include the authority to agree to a pre-dispute arbitration of the patient's legal claims. **Lederlinic v. Nursing, __ So. 3d __, 2024 WL 1708921 (Fla. App., April 19, 2024); Nursing Home v Woford, __ S.W. 3d __, 2024 WL 1686044 (Ky. App., April 19, 2024).**