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LEGAL EAGLE EYE NEWSLETTER

For the Nursing Profession

August 2014 Volume 22 Number 8

Patient Fall: Cognitively Impaired Patient Was Told To Stay Seated, Left Alone On The Toilet.

The seventy-two year-old patient was admitted to a psychiatric facility to adjust her medications in an inpatient setting.

On admission to the unit a nurse completed a fall-risk assessment. Factors taken into consideration included a history of dementia. The patient's evaluation revealed current delirium, impaired cognition, poor insight and judgment, sensory impairments including cataracts and hearing loss, weakness and unsteady gait.

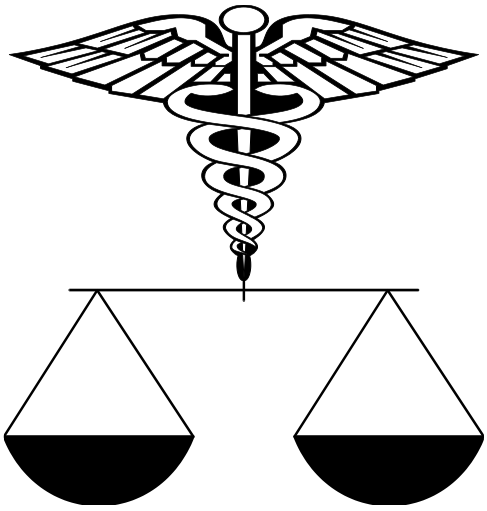
The patient was deemed to be a fall risk and the nursing care plan required her to be assisted to the bathroom if she got up during the night.

It was undisputed that the patient's nursing caregivers on the night in question were aware of the nursing care plan's requirement for assistance.

When a lawsuit was eventually filed against the facility for the patient's injury from her fall, the statute of limitations had already elapsed.

The judge nevertheless allowed the lawsuit to go forward on the grounds that the patient was mentally incompetent when the incident arose which gave rise to her lawsuit, accepted legal grounds for extending the statute of limitations.

The lawsuit resulted in a jury verdict for the patient against the facility.



The patient had impaired cognition, poor insight and judgment, weakness and unsteady gait.

She had been assessed as a fall risk.

Orders and a nursing care plan were in place for her to be assisted to the bathroom.

Her caregivers simply told her to stay seated and left her alone in the bathroom.

COURT OF APPEALS OF GEORGIA
July 15, 2014

On the night in question the patient's bed alarm was triggered when she started climbing over the bed rails to get up to go to the bathroom.

Her nurse and an aide went to the room, helped her out of bed, got her slippers for her and then side-by-side walked her toward the bathroom.

On the way the patient urinated on the floor. They proceeded to the bathroom, sat her down and told her to stay seated while they cleaned up the floor.

The nurse and the aide left the patient alone in the bathroom while they went for towels to wipe the floor.

While the nurse's back was turned the patient stood up, walked into her room, slipped on the area that was still wet, fell and fractured her ankle. She had to be taken to an acute care hospital in an ambulance.

Court Finds Negligence

The Court of Appeals of Georgia ruled it is negligence for caregivers who are aware of a patient's fall risk due to mental and physical infirmities, for whom orders and a care plan are in place for assistance to the bathroom, to leave the patient alone and unattended simply with instructions to the patient to remain seated and wait for them to return before trying to stand up. **Emory Healthcare v. Pardue, __ S.E. 2d __, 2014 WL 3409186 (Ga. App., July 15, 2014).**

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Speech-Impaired Patient: Court Rejects Disability Bias Lawsuit.

In the hospital the patient's diagnoses included bipolar disorder, acute anxiety, tardive dyskinesia and post-traumatic stress disorder, which she claimed confirmed her status as a disabled person with the right to be free from discrimination based on her disabilities.

She also has a speech impairment, for which she relies upon a battery-operated computer which reproduces the text she types into the device as speech which others can hear.

Her computer must be plugged in for recharging when not in use. During the night during her hospital stay the computer was kept plugged in at the nurses station.

When the patient asked for it, however, the nurses allegedly refused to give it to her. Then she wrote a follow-up request on a napkin and was allegedly placed in seclusion. She then had to attend her discharge conference without any effective means of communication.

To obtain a court order guaranteeing future treatment free from discrimination by a care provider, a disabled person must come forward with actual proof that future involvement with the same provider is virtually certain to occur.

UNITED STATES DISTRICT COURT
WISCONSIN
July 1, 2014

The US District Court for the Eastern District of Wisconsin ruled the patient as a disabled person was not entitled to sue the hospital for a court order compelling the hospital to conform its policies and practices to Federal guidelines established under the Americans With Disabilities Act as far as other patients are concerned.

The patient would be entitled to a court order affecting the conditions of her own future hospitalization at the same facility, but only if she had solid proof that future hospitalization was certain to occur. **Reed v. Columbia St. Mary's, 2014 WL 2987311 (E.D. Wisc., July 1, 2014).**

A hospital falls within the definition of a place of public accommodation and as such is subject to the US Americans With Disabilities Act (ADA).

The ADA defines discrimination by a place of public accommodation as failure to make reasonable modifications in policies, practices or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities, unless such modifications would fundamentally alter the nature of such goods, services, facilities, advantages or accommodations.

Disability discrimination is also outlawed by the US Rehabilitation Act.

The Rehabilitation Act applies to any program or activity receiving Federal financial assistance, such as hospitals that participate in Medicare or Medicaid.

The Rehabilitation Act says that no otherwise qualified individual with a disability shall be excluded from participation in or denied the benefit of Federally financed programs or be subjected to discrimination on the basis of disability.

UNITED STATES DISTRICT COURT
WISCONSIN
July 1, 2014

Patient's Fall: Court Not Able To Find Evidence Of Nursing Negligence.

The patient was admitted to the hospital with a diagnosis of terminal mucinous adenocarcinoma of the appendix to undergo a surgical procedure to remove a large abdominal tumor.

Five days after her surgery she spilled water in her hospital bed and used her call button to summon her nurse.

A nurse came to the room and assisted the patient to a sitting position with her legs over the side of the bed. The nurse left the patient alone in that position while the nurse went to get some new bed linen and dispose of the towels she had used to mop up the water from the floor.

When the nurse returned she found the patient on the floor with a cut on her forehead. The patient soon became unresponsive. Advanced cardiac life support was initiated but the patient soon passed away.

The family's expert, a physician, never reviewed the hospital's protocols for fall risk assessment and fall prevention, and was himself unfamiliar with general nursing standards.

UNITED STATES DISTRICT COURT
RHODE ISLAND
July 7, 2014

The US District Court for the District of Rhode Island dismissed the family's lawsuit which alleged negligence by the patient's nurse. The simple fact a patient falls does not prove negligence without proof of substandard fall-risk assessment and/or inadequate fall precautions which failed to meet the hospital's own internal protocols or general nursing standards.

It was also inconclusive that the moment of the patient's fall was not the moment when she finally succumbed to her serious medical co-morbidities. **Morris v. Rhode Island Hosp., 2014 WL 3107296 (D. Rhode Island, July 7, 2014).**

Labor & Delivery: Monitor Strips Gone, Court Rules Hospital Not Guilty Of Evidence Spoliation.

The family filed a lawsuit on their young son's behalf for alleged negligence committed by the hospital's labor and delivery nurses and physicians.

At or near the time of birth the child experienced oxygen deprivation resulting in severe neurological deficits including spastic quadriplegia, blindness and an inability to speak.

The Court of Appeals of Georgia threw out the verdict exonerating the caregivers, but only because the judge erred by holding a session with the jury without the lawyers present. A new trial is pending.

Missing Fetal Monitor Strips

The Court of Appeals assumed there would be further controversy in the new trial about the missing fetal monitor strips, and decided to give the trial judge advance guidance about the legal rule of spoliation of the evidence.

Spoliation of the Evidence - Definition

Spoliation of the evidence is intentional destruction or failure to preserve evidence that is advantageous to the other side in contemplated or pending litigation.

When spoliation of the evidence has occurred, the other side is entitled to a logical inference and a jury instruction to the effect that the unavailable evidence would have been damning to the party responsible for its unavailability.

Spoliation of the evidence can only occur after the party in possession or control of the evidence has been put on notice that the alleged injured party is contemplating litigation.

The simple fact that someone has been injured is not notice that the injured party is contemplating litigation and does not automatically trigger the legal rules on spoliation of the evidence.

Recognition of potential liability is not the same as notice of potential litigation.

The facility's sentinel events/medical errors policy did trigger an internal investigation and the facility's insurance carrier and legal counsel were notified, but the hospital's policy did not designate the monitor strips as part of the official record that needed to be preserved.

COURT OF APPEALS OF GEORGIA
July 15, 2014

The hospital uses electronic charting. The fetal monitors, however, print a paper strip on which the nurses often hand-write notes which the nurses use when typing their nursing notes into the computer.

Although the electronic charting stays around basically forever, the paper fetal monitor strips are routinely kept only for 30 days, then destroyed unless some good reason has surfaced for not doing so.

In this case the labor and delivery nurse testified she remembered penning a handwritten note on the strip as to the time when the ob/gyn actually appeared at the bedside in response to her page.

The time lag, or lack thereof, between abnormal data appearing on the monitor, the nurse paging the ob/gyn, and the ob/gyn actually arriving were critical facts.

The family's lawyers wanted evidence that the nurse's computer charting was not what really happened, but the paper monitor strip itself was gone, so a logical inference from the legal rule of spoliation of the evidence would be the next best thing.

No Spoliation of the Evidence

The Court of Appeals said there was no spoliation of the evidence. The monitor strips were discarded in the ordinary course of business according to hospital policy, while no litigation was pending, threatened or known to be contemplated.

An internal quality review investigation, in and of itself, does not amount to knowledge of future litigation, assuming the hospital has not yet been placed on notice by the patient or a representative. **Lee v. Harmon, __ S.E. 2d __, 2014 WL 3409215 (Ga. App., July 15, 2014).**

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Improper Delegation Of Nursing Responsibility: Discrimination Lawsuit Dismissed.

A nurse had to see that a patient in the TB isolation unit received certain oral medications before being transported from the isolation unit to another hospital department for a diagnostic procedure.

The nurse did not have a mask, which was required to enter the isolation unit. Rather than going to get a mask, she asked the patient transporter who was wearing a mask to carry the medications into the isolation unit and give them to the patient.

The transporter hesitated, but, after the nurse insisted, went into the isolation unit and gave the medications while the nurse watched on a closed-circuit monitor. The transporter afterward reported the incident to a supervisor.

The nurse received a very favorable performance review a few days later, but that apparently had already been written before this incident came to light. When it did come to the attention of hospital management, she was terminated.

The nurse sued for age and national origin discrimination. She was fifty-nine years old at the time and is from India.

The US District Court for the Eastern District of Michigan dismissed her case.

Violations of Hospital Policy, State Nursing Regulations Were Legitimate Reasons for Termination

Hospital policy requires nurses, physicians and dentists who administer medications to know what medication is being given, verify that the medication is correct based on the physician's orders, check the expiration date, verify that there are no contraindications, verify the time, dose, route and patient, address patient or family concerns and educate the patient and family as to possible adverse reactions and remain with the patient until the medication has been taken.

State nursing regulations on delegation of nursing responsibilities require the nurse to ascertain that the person to whom a task is delegated has the necessary knowledge and skill so that the task can be carried out safely and completely. A patient transporter does not fit that category. **Varughese v. William Beaumont Hosp., 2014 WL 3361897 (E.D. Mich., July 8, 2014).**

State law says that before delegating any nursing duty, a nurse must determine the qualifications of the delegatee and verify that the delegatee has the necessary knowledge and skills for the task to be carried out safely and completely.

When asked what she did to verify the patient transporter's qualifications to administer medications safely and completely, the nurse replied, "Anyone can give a couple of pills to a patient."

The nurse admitted she was familiar with the hospital's own internal policies for administering medications.

One of the nurse's duties is to stay with the patient a minute or two after administering medication to monitor any adverse reaction.

The nurse also admitted that to ensure patient safety the nurse must verbally confirm the patient's identity by asking for the patient's name and date of birth and check the name and date of birth from the medication order against the information on the patient's wrist band.

UNITED STATES DISTRICT COURT
MICHIGAN
July 8, 2014

Whistleblower: Nurse's Termination Was Justified.

A telephone triage nurse got a call from one of the system's facilities asking her to authorize release of a deceased patient's remains to a funeral home.

The nurse looked it up in the binder containing the seniors program's policies and procedures. It stated that a nurse was authorized to release a body.

The nurse believed that was illegal. She informed her supervisor and told the other triage nurses not to follow what she believed was an illegal policy.

Management inquired and learned from the state board of nursing that the policy was, in fact, illegal, and so the policy was rewritten. The triage nurses had already been told not to follow it.

There had been ongoing complaints from families and co-workers about the nurse's rude and inconsiderate attitude. That problem came to a head over a voicemail from the nurse about a scheduling mix-up which a co-worker took as threatening.

The first thing a court looks for as evidence that whistle-blowing led to an employee's firing is proximity in time between the whistle-blowing activity and disciplinary action taken by the employer.

COURT OF APPEALS OF MINNESOTA
July 7, 2014

The nurse was terminated.

The Court of Appeals of Minnesota agreed the nurse blew the whistle on a policy of her employer which was clearly illegal. However, even a true whistleblower must prove that whistle-blowing was the reason for being terminated.

The problem was that months went by after she blew the whistle with no adverse action by her employer until she left a threatening voicemail, and that led to her termination. **Salscheider v. Allina Health, 2014 WL 3024290 (Minn. App., July 7, 2014).**

Discrimination: Nurse Applied For Social Security Disability Benefits.

A perioperative nurse sustained a number of work-related injuries to her knee, neck and back for which she spent significant amounts of time off work on worker's compensation.

She also began having problems with getting to work on time. Matters came to a head when she arrived several hours late without calling in. She said she was having physical problems related to her old injuries. Eventually she was terminated.

Shortly after her termination the nurse applied for Social Security disability benefits, claiming her last day on the job at the hospital as the date she became disabled. Social Security accepted her claim and began paying benefits.

The nurse also sued her former employer for disability discrimination.

A former employee who says in a Social Security disability application that he or she is unable to work has a big problem suing for disability discrimination claiming to be a person who is able to work despite a disability.

UNITED STATES DISTRICT COURT
MINNESOTA
July 8, 2014

The US District Court for the District of Minnesota accepted the fact the nurse had a disability, but ruled she was not a qualified individual with a disability as she herself basically admitted she was unable to do her job in the surgical department.

The Court rejected the argument the nurse was unable to do her job only because her employer refused to grant reasonable accommodation.

It would not be a reasonable accommodation for a surgical nurse to be given the freedom to come to work only when she felt able. **Distefano v. Essentia Health, 2014 WL 3101324 (D. Minn., July 8, 2014).**

Impaired Nurse: Disability Discrimination Case Dismissed.

The nurse's impairment on the night in question was not caused by the Tegretol she often took without side effects which usually controlled her otherwise disabling trigeminal neuralgia.

On the night in question the nurse, either at home before her shift or later on the job, took a combination of Tegretol, Ativan and tramadol, each of which alone can cause dizziness, sedation and somnolence according to the Physician's Desk Reference.

Her misconduct was not caused by her disability but by her ill-advised and dangerous decision to take these three drugs all at the same time.

The nurse's failure to follow the facility's established protocols for distribution and documentation of narcotics was not caused by impairment from taking her patients' narcotics, but by taking her own prescribed medications.

She honestly had no idea what happened to the missing narcotics.

She herself admitted she was impaired at work and in no condition to care for her patients.

She was not qualified to perform her job as a nurse.

UNITED STATES DISTRICT COURT
OHIO
July 8, 2014

Several months before accepting her position in a long-term rehab facility a registered nurse was diagnosed with trigeminal neuralgia.

Her condition makes her prone to intense flare-ups of pain in her lips, eyes, nose, scalp, forehead, gums, cheek and chin on one side of her face.

The nurse was accustomed to taking Tegretol for a flare-up which usually resolved her symptoms within twenty minutes. The nurse also had prescriptions from her doctor for Ativan and tramadol.

The state pharmacy board had ordered an audit of narcotics at the facility after a practice of nurses' late charting of their narcotics was discovered. The nurse was not implicated in the audit. However, the audit did heighten the facility's overall level of alertness as to possible medication tampering and diversion.

Nurse Found Impaired on the Job

Her charge nurse found the nurse unsteady on her feet, incoherent and disorientated. The charge nurse insisted on a medication count before letting her go home. The count turned up discrepancies with several narcotics, including tramadol.

The nurse was required to take a drug test the next day which was negative except as to tramadol, for which she had a physician's prescription.

The nurse was terminated.

Court Dismisses
Disability Discrimination Lawsuit

The evidence related the nurse's impairment on the job to a combination of medications taken together which she had before only taken alone, medications which were legitimately prescribed by her physician for a medical condition which was a legitimate legal disability.

There was evidence of substandard charting of narcotics but no proof the nurse diverted those narcotics for her own use.

The US District Court for the Southern District of Ohio ruled that the nurse's impairment on the job caused by the combination of medications was an issue her employer was not required to tolerate, even if she had prescriptions for the medications because of a legitimate disability. **Sper v. Judson Care Ctr., __ F. Supp. 2d __, 2014 WL 3108067 (S.D. Ohio, July 8, 2014).**

Gangrenous Lesion: Nursing Home's Care Was Substandard.

A nursing home resident developed a serious pressure lesion on his hand.

There was a period of delay before the problem was reported to the resident's physician.

When the problem was reported, the physician ordered the nursing home to obtain a consultation from a wound care specialist. That call was not made for a couple of days while the wound progressed from dark red to maroon and then to black and the hand became gangrenous and mummified and had to be amputated.

The family's expert is a physician who has treated geriatric patients in nursing homes for the same and similar conditions and is qualified as an expert for this case.

COURT OF APPEALS OF TEXAS
July 3, 2014

The Court of Appeals of Texas ruled that the family's medical expert correctly stated the applicable standard of care.

Any significant change in a nursing home resident's health status must be promptly reported to the resident's physician and the physician's orders must be promptly carried out.

Management of this patient's serious skin lesion required prompt referral to a wound care specialist, just as the resident's physician had ordered, for debridement and hyperbaric oxygen treatment before the wound progressed to the point that hyperbaric treatment was not effective.

Just two days' delay while the wound went through major deterioration was completely unacceptable and more likely than not led directly to the unfortunate outcome.

There also were lapses in pressure relief and repositioning which led to the lesion's development in the first place. **Trisun Healthcare v. Lopez, 2014 WL 3050350 (Tex. App., July 3, 2014).**

Correctional Nursing: Court Sees Grounds For Inmate's Family's Lawsuit.

The jail inmate had a long history of mental illnesses including schizophrenia, schizoaffective disorder and bipolar disorder.

His sister had him involuntarily committed. Soon after his release he phoned 911 and threatened to harm himself. He also made terroristic threats which led to his incarceration in the county jail.

In the jail his medical screening revealed his recent hospitalization in a psychiatric facility coincidentally operated by the same company that provided healthcare personnel to the county jail.

Corrections officers began reporting his acting out and his strange behaviors to the jail nursing staff

The jail nurses basically saw to it that his anti-psychotic medications were on hand and were given to the corrections officers to give to him.

Nurse Never Examined the Patient

At one point the officers told the nurse he was lying on the floor of his cell in his own urine moaning and unresponsive.

The nurse's only response to increasing concerns voiced by the corrections officers about the inmate's health was a remark that, "I can't fix crazy."

Days after he was first reported lying unresponsive moaning in his cell the patient died from a cecal volvulus, a painful and ultimately fatal twisting of the large intestine which is extremely rare in otherwise healthy young adults.

Court Finds Grounds for Lawsuit

The US District Court for the Middle District of Alabama ruled there were grounds for the family's lawsuit.

The Court faulted the nurse's dismissive attitude and blamed the death on her refusal to examine the patient or obtain an examination to rule out physical illness, rather than attributing the signs displayed by the inmate simply to his mental illness.

Deliberate indifference by a medical caregiver violates a prisoner's rights. **McCall v. Houston County, 2014 WL 3045552 (M.D. Ala., July 3, 2014).**

Vomit Aspiration: Suit Alleges E.D. Nursing Neglect.

The patient was transported in an ambulance to a rural hospital's emergency department.

He was accompanied by his wife who had called 911 because he became very sick in the middle of the night.

In the emergency department the patient was left unattended lying on his back on a gurney with an O_2 mask on his face.

He threw up into the mask while the nurses were not paying attention to him. When his wife alerted the nurses to what had happened the nurses took off the oxygen mask, but they did not turn him on his side to prevent aspiration of his own vomit or do anything else to help him.

With the oxygen mask off, while still lying on his back, the patient threw up two more times. One of the nurses reportedly stepped back and exclaimed, "Eoooow" but still the patient was not turned and nothing was done to help him.

After a fourth bout of vomiting while still lying on his back the patient had to be airlifted to a regional medical center where it was confirmed he had aspirated his own vomit and contracted aspiration pneumonia. He died several days later.

The widow was required to follow procedures outlined by state law for filing a liability claim against the first hospital, which is operated by a county public hospital district.

SUPREME COURT OF WYOMING
June 23, 2014

After recounting in detail the disturbing sequence of events, the Supreme Court of Wyoming nevertheless dismissed the lawsuit the widow brought against the first hospital, on the grounds that the widow or her attorney did not file a notice of claim within the strict time limit required by Wyoming statutes with the local county public hospital district which operated the hospital. **Stroth v. North Lincoln Hosp. Dist., 327 P. 2d 121 (Wyo., June 23, 2014).**

Breast Cancer: Delay In Treatment Tied To Nurse's Negligence.

The patient reported breast tenderness and pain to her nurse practitioner.

The nurse practitioner did not perform a physical exam but did refer the patient for a mammogram and ultrasound. The radiologist's interpretation of the mammogram done three days later was microcalcifications which were probably benign.

The radiologist's recommendation was for follow-up within three to six months. His recommendation was stated in his written report which he mailed to the patient's primary care physician at the clinic.

The patient was never informed of the radiologist's recommendation for follow-up when she saw her primary care physician and her nurse practitioner in the same clinic multiple times over the next sixteen months for various health concerns.

Sixteen months after her mammogram the patient referred herself to a breast specialist who did a biopsy which found high-grade ductal carcinoma in situ. That diagnosis led to a mastectomy during which a sentinel node biopsy showed the Stage IIIC ductal carcinoma was invasive. The patient's prognosis at this time is poor.

The patient's medical expert linked her current prognosis to negligence by her primary care physician and nurse practitioner which delayed treatment of what actually was rapidly progressing breast disease.

COURT OF APPEALS OF TEXAS
June 26, 2014

The Court of Appeals of Texas agreed with the patient's experts that the nurse practitioner and primary care physician were negligent for failing to inform and instruct the patient about the radiologist's recommendation. Earlier follow up likely would have led to earlier diagnosis, earlier intervention and a more positive outcome. **Consultants in Radiology v. S.K., 2014 WL 2922301 (Tex. App., June 26, 2014).**

Labor & Delivery Nursing: Prolapsed Cord, Court Sees Grounds For Negligence Suit.

The jury ruled in favor of the hospital, but the jury's verdict was tainted by legal error by the judge and a new trial must be held.

The trial judge erred when he instructed the jury they could find the hospital not liable for the nurses' actions if the nurses were simply reacting in the face of a sudden emergency which was not and should not have been anticipated.

As a general rule, legal liability is not imposed upon an individual for failing in the face of a sudden and unexpected emergency to use the same prudent judgment that would come to bear when there is sufficient time to deliberate calmly before acting.

The common-law sudden-emergency doctrine is not applicable to this case.

The nurses did not adhere to accepted nursing standards and did not follow the hospital's own internal nursing protocols.

There should have been a vaginal exam before the Pitocin was started. That exam more likely than not would have caught the problem and led to a c-section much sooner.

COURT OF APPEALS
OF NORTH CAROLINA
July 1, 2014

The mother was admitted to the hospital for induction of labor. Induction was paused during the night and resumed at 8:00 a.m. in the morning.

Her prenatal care had revealed nothing that alerted her caregivers to any heightened risk factors.

No Vaginal Exam Before Induction of Labor

At 12.54 p.m. while induction was well underway a labor and delivery nurse performed the first vaginal exam since the mother's admission. A prolapsed umbilical cord was discovered.

The nurse immediately notified the attending physician and steps were set in motion for an emergency c-section. The c-section was started within sixteen minutes.

The newborn's APGAR scores were 0 at one minute, 3 at five minutes and 7 at ten. The baby was transported to a specialized children's hospital but severe brain damage could not be avoided which has left the child with permanent cognitive impairments and loss of motor control.

Lawsuit Alleges Violations of Nursing Standards, Hospital Protocols

Testimony from the parents' medical expert accused the hospital's labor and delivery nurses of negligence.

Labor and delivery nurses must perform a vaginal exam on admission before induction of labor is started with Pitocin.

The results of the exam, one way or the other, which in this case was not actually performed on admission, should be communicated to the attending physician.

If Pitocin is in use when a prolapsed cord is discovered it must be stopped immediately to arrest the induction of labor and terbutaline started to slow or stop the mother's contractions.

The mother should be moved to the operating room as quickly as possible to get an emergency c-section started.

The Court of Appeals of North Carolina ruled the parents' expert correctly stated the nursing standard of care, which the hospital had incorporated into its own internal nursing protocols. **Wiggins v. East Carolina Health, __ S.E. 2d __, 2014 WL 2937083 (N.C. App., July 1, 2014).**

LEGAL EAGLE EYE NEWSLETTER
For the Nursing Profession

US False Claims Act: Court Sees A Basis For Nurse's Lawsuit.

The US False Claims Act allows a private individual to file a civil lawsuit to recoup money paid by the US Federal government to a person or corporation guilty of obtaining the money from the government by fraud.

If the lawsuit is successful in proving fraud, the private individual is entitled to keep a percentage of the funds recouped, which in some cases has been tens of millions of dollars, while the US Federal government gets the rest.

While employed in a dialysis center where she no longer worked when she filed her lawsuit, a nurse noticed that her facility was "harvesting" the remaining unused portions of a certain medication from single use vials and using it with its patients.

Use of this medication on a so-called harvested basis had been approved by the US Department of Health and Human services, if all of a certain set of conditions were met.

It was alleged in the nurse's lawsuit that these conditions, in fact, were not being met, but that was only a side issue that was not directly relevant to the nurse's lawsuit.

Directly relevant was the fact that the facility's records showed that an average of 50 patients were being treated each day with the medication, while only 29 to 35 single-use vials of the medication were being purchased per day over the same time period.

The facility billed each of its Medicare patients for a single-use vial but apparently was not using a new single-use vial with each patient. The patients who were getting doses of so-called harvested medication provided the facility with a financial windfall.

Again, the issue was not whistle-blowing about a practice that violated Medicare patient-care standards or one that posed a risk to patient health and safety. The issue was the facility was billing Medicare for something, a new single-use vial for each patient, which it was not providing.

The US Court of Appeals for the Third Circuit ruled that the evidence in the nurse's lawsuit met the False Claims Act's very strict requirement for solid proof of a fraudulent billing practice actually being carried out. **Foglia v. Renal Ventures, __ F. 3d __, 2014 WL 2535339 (3rd Cir., June 6, 2014).**

Pregnancy Discrimination: CNA Fired Before Restrictions From Her Physician Took Effect.

The facility had a policy that light duty was given to care-giving employees only to accommodate medical restrictions from work-related injuries.

The court record showed that the facility enforced this policy on an even-handed basis with all its employees.

Employees with medical restrictions due to other causes, including pregnancy or non-work related injuries, were entitled under company policy to apply for unpaid disability or personal leave. They could ask for Family and Medical Leave Act leave if employed at the facility for more than a year.

The above are legitimate and lawful employment practices, according to the US District Court for the Northern District of Illinois.

The certified nursing assistant in question had a letter from her physician that due to her pregnancy she was unable to lift, push or pull more than twenty pounds. That was incompatible with her direct patient-care duties.

The CNA was fully able to work until her 20th week of pregnancy, according to her own physician.

A jury could reasonably conclude that she was let go in her 15th week for a reason other than physical limitations, namely discrimination based on her pregnancy.

An employer cannot make decisions about a pregnant employee's capabilities.

UNITED STATES DISTRICT COURT
ILLINOIS
July 15, 2014

The CNA got a second letter from her physician. It clarified that her restrictions would not come into effect for five more weeks, until her 20th week of pregnancy. Nevertheless she was not scheduled further for work and was fired when she did not apply for leave.

The Court saw grounds for a pregnancy discrimination lawsuit.

It is discriminatory for an employer to rely on the employer's own assumptions about a pregnant employee's capabilities *vis a vis* her pregnancy, apart from the judgment of the employee's own physician, when taking action affecting a pregnant employee. **Cadenas v. Butterfield Health, 2014 WL 3509719 (N.D. Ill., July 15, 2014).**