

# Skilled Nursing: Facility Did Not Prevent Patient-To-Patient Sexual Acting-Out, Penalty Upheld.

The patient's diagnoses on admission to a skilled nursing facility included Parkinson's disease, chronic renal failure and progressive dementia. He was usually disoriented but was able to wheel himself around independently in his wheelchair.

His attending physician, who was also the facility's medical director, wrote an admitting note that he had a history of problematic behaviors including hitting and groping staff and patients.

A few days into his stay a nursing progress note referred to sexually inappropriate behavior toward female staff.

The physician then wrote an order for a psychiatric consult, which was never actually carried out because his cognitive deficits would have made an in-depth psychiatric evaluation impracticable.

On his tenth day in the facility he rolled up to a female resident and began fondling her. A nurse wheeled him to the other side of the day room. About an hour later a resident came to the nurses station and reported he was fondling the same resident again, with his hands under the blanket on her lap and in her diaper.

The next day there was a nursing progress note that he was fondling another female resident in the dining room and the next day another progress note that he had

**Federal regulations require a skilled nursing facility to ensure that each resident receives adequate supervision and assistance devices to prevent accidents.**

**The definition of the word accident includes sexual acting-out by another patient, if the acting-out is foreseeable and if the facility's response to its foreseeability is inadequate under the circumstances.**

**After he fondled a female patient the first time he should have been checked at least every fifteen minutes, but he was not. The acting-out continued.**

**A later note in the care plan stated he was becoming increasingly sexually aggressive, but nevertheless basically nothing further was done about the problem.**

UNITED STATES COURT OF APPEALS  
FOURTH CIRCUIT  
February 28, 2013

become increasingly aggressive in seeking sexual relationships with others.

The care plan was updated with fourteen specific interventions, including medications to control his behavior, one-on-one supervision and encouragement to participate in recreational activities.

A week later he was still wheeling himself around to female residents and trying to fondle them. Two weeks after that a note stated he had to be redirected six times. He entered one resident's room and tried to get in bed with her.

The same behaviors continued almost another month before a complaint was finally lodged with the state Department of Health and Human Services. An investigation led to a civil monetary penalty of \$3700 per day of immediate jeopardy for a seventy-two day period plus \$100 per day for twenty-four more days.

The US Court of Appeals for the Fourth Circuit (North Carolina) upheld the civil monetary penalty.

After the first inappropriate touching of another resident the numerous incidents that followed were foreseeable.

No meaningful changes were included in the care plan for almost six weeks, and then the new interventions were never actually carried out.

One-to-one supervision was supposed to be provided whenever the perpetrator himself was out of bed but was provided only sporadically if at all. It was foreseeable without such close monitoring that his inappropriate acting-out would continue, and it did. **Libertywood v. Sebelius, 2013 WL 729786 (4th Cir., February 28, 2013).**

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