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ALLEGATIONS OF UNDERSTAFFING ARE NOT ELDER ABUSE

by Laura K. Sitar

In a move hailed by attorneys who defend long term care providers across California, the California Court of Appeal has ruled that allegations of understaffing and under-training in the skilled nursing care setting do not rise to the level of elder abuse, but are simply allegations of professional negligence. *Worsham v. O'Connor* (2014) 226 Cal. App. 4th 331.

How did we get this favorable decision? Juanita Worsham brought a complaint for negligence and elder abuse against O'Connor Hospital, Inc. where she had been admitted for rehabilitation following hip surgery. Twenty days into her residency she fell and fractured her right arm and re-fractured her hip. Her complaint, drafted by the attorneys at Garcia Artigliere & Medby, alleged that the transitional care unit at O'Connor Hospital was required to maintain specific staff-to-patient ratios to address the needs of their patients and to ensure compliance with state and federal law. They further alleged the facility was chronically understaffed and undertrained and knew that Ms. Worsham was at risk of falling, but still failed to have the proper staff in place to prevent her fall and the subsequent injuries. The trial court was unimpressed and on demurrer dismissed Ms. Worsham's cause of action for elder abuse without leave to amend.

After some unsuccessful legal maneuvering the Garcia firm dismissed the negligence claim and immediately appealed the trial court's ruling. The Court of Appeal affirmed the lower court's ruling reasoning that the alleged understaffing was a "negligent undertaking of medical services" rather than a fundamental failure to attend to Ms. Worsham's basic needs and comforts to carryout their custodial or caregiving obligations. The court noted that the Elder Abuse Act does not apply to simple or gross negligence by long term care providers, but only when there is clear and convincing evidence of recklessness, oppression, fraud or malice. We anticipate seeing creative pleadings by plaintiffs' counsels to try to meet that burden, but this case provided the defense bar with a powerful weapon early on to attack elder abuse claims.

About the Author:

A shareholder at Wroten & Associates, Laura Sitar defends medical malpractice, employment, and elder abuse cases. She litigates cases on behalf of doctors, dentists and long-term care facilities involving all types of employment actions including sexual harassment, wrongful termination, retaliation and wage and hour claims. She also provides employment related risk management services to help clients avoid litigation.

Ms. Sitar became an attorney after a 15-year career in corporate management where she directed the human resource function of a 2000 employee, \$100 million region. Since commencing a second career in law 10 years ago, she was a senior associate with a prestigious healthcare defense firm before joining Wroten & Associates, where she is a shareholder.

Ms. Sitar graduated cum laude from Tufts University, in Boston Massachusetts in 1979. She attended Western State University, College of Law, where she graduated summa cum laude and valedictorian of her class in 1998. While at Western State she clerked for Justice William Rylaarsdam on the California Court of Appeals and successfully argued a sexual harassment and retaliation claim before the Ninth Circuit Court of Appeals. She was a recipient of the 1998 Fellowship of the American Board of Trial Advocates. Ms. Sitar has been a member of the California State Bar since 1998 and is admitted to practice in the U.S. District Court for the Central District of California.

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