ELDER LAW & LONG TERM CARE

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Turning the Tide Against Abuse Claims?

by Kippy Wroten

Van Nuys Jury Returns Unanimous Defense Verdict On "Abuse" Claim Against SNF Involving Stage IV Decubitus Ulcer And Subsequent Death

It's no secret that the litigation landscape traversed by the long-term care industry has provided a slippery slope since the publication of the 1999 Delaney vs. Baker case. A successful Plaintiff's litigation model was developed in Florida during the 1990's and ultimately landed in California in 2001. On December 15, 2004, a unanimous defense verdict was obtained following a 6-week trial that involved plaintiff's claim of abuse leading to the development of a stage IV coccyx ulcer, septicemia, and death of a 63-year-old woman. I believe the legal strategy utilized during this trial provides a strong foundation for a new defense model that will launch future courtroom successes for our brethren. Our success is the product of experience and many discussions with clients, carriers, and yes, other defense counsel who have "fought the good fight." Following is summaries of what I believe are the essentials of a successful defense.

DISCOVERY

It is often difficult to balance cost effectiveness with the need to challenge voluminous discovery demands made by an aggressive plaintiff's lawyer. While it is time consuming to challenge the discovery demands served routinely in the typical "abuse" case, the time spent limiting the production of evidence is critical to our ability to limit the introduction of irrelevant evidence in the trial court. Following is an outline of information that should be considered for potential objection.

1. Corporate Documents

Corporate financial documents that aren't already in the public domain should be vigorously protected. Having the right to "claim" punitive damages is far different from having the right to "demand" financial documents. Efforts to either preclude the production of such documents or in the alternative, to allow production only under court seal that precludes their review prior to a "potential" punitive phase of a bifurcated trial, should be made. In this manner, ready access to the documents is assured "if" and "when" they actually become relevant. Inappropriate use of the information to artificially inflate settlement values is therefore stopped.

2. Quality Assurance Documents

Our clients should all be advised to prepare disclaimers for their Policy & Procedure documents. Disclaimers should state that the manual is merely a resource tool and that nursing judgment must be individualized to address each patient. Staff should receive in-service training to explain the limited role of the Policy & Procedure manual. Documents that aren't required by regulations should be specifically identified in writing as "Privileged Quality Assurance" records. Care should be taken to protect our efforts to improve service from being used against us as a sword in future litigation.

PRE-TRIAL

The final stages of pre-trial preparation should focus on the preparation of our selected expert witnesses. A strong expert witness is essential to deflating hyped claims of abuse.

1. Defense Expert Witnesses

Care should be taken to select expert witnesses who are both qualified and capable of relating their knowledge to a jury. A knowledgeable expert who can't "teach" the jury is of little value. Adequately preparing your expert for deposition should be a priority as defense expert witnesses need to ready to validate their opinions. Defense experts also need to be informed when they face the prospect of being questioned by an acrimonious plaintiff attorney. Being alerted to the strategy employed to discredit opinions allows the expert time to consider the challenges that will be made to their testimony.

2. Plaintiff Expert Witnesses

Taking the time necessary to lock in the Plaintiff expert to their opinions and the foundation for those opinions can provide a huge resource for impeachment. The Plaintiff's expert who expands "ad nauseam" on meritless opinions is setting up their own failure. Be certain to get those opinions stated in "sound bites" that can be effectively re-read to the jury. The expert who proliferates for pages in their deposition transcript effectively avoids being impeached at trial.

3. Bifurcation of the liability and punitive damage phases of trial

Be certain to demand the bifurcation of the liability and punitive damage phases of trial. Use this as a tool to limit the introduction of evidence in the liability phase of trial to that which is truly relevant to liability! (No "profits over people" rhetoric.) The education of the judge begins in discovery but continues through the motions in limine. It is important to lay the foundation to preclude irrelevant evidence such as DHS records, staffing ratios, and financial records before voir dire begins. Be certain to limit inappropriate legal conclusions often voiced inappropriately by Plaintiff expert witnesses ("care was malicious" or "care violated regulations"). Such conclusions are outside the province of "expert" knowledge and are a violation of the province of the jury. Know the key cases that will be argued. Plaintiff counsel often makes broad leaps to unsupported conclusions that sound good but aren't legally sound. You must be prepared to immediately respond so that the judge doesn't "assume" the validity of the erroneous argument.

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Witnesses that weren't involved in the specific care at issue (those disgruntled former employees) should be precluded from providing testimony in the liability phase of trial. Again, use the bifurcation of the liability and punitive phases to keep the evidence focused on the specific care at issue.

Keep your strategy on track. Remember that your liability case involves 3 tiers: (1) negligence where MICRA applies (don't forget the limitation provided by Welfare and Institutions Code section 15657 (b) and 15657.2), (2) recklessness (no punitive damages here), and (3) malice, oppression, or fraud (punitive damages "may" apply). Review your verdict form to be certain it appropriately separates these legal concepts and the attendant burdens of proof so that the distinction is not blurred.

Review your jury instructions and augment those new CACI instructions that in many instances provide weak and incomplete instructions in the effort to utilize lay language. Special jury instructions should be crafted early and demanded to ensure the proper application of the law.

Remember that the Plaintiff wants to create an "abuse" picture through cumulative references to the inconsequential. You must be prepared to fight the introduction of even the smallest bit of irrelevant testimony. Let the judge know that your client's rights will be trampled if the court fails to adequately steward the substantive and procedural due process rights to which you are entitled. Make your record and make it often.

Be prepared to explain the complicated legal theories effectively to your jury. Emphasize the difference between the applicable burdens of proof and degrees of culpability. Highlight the requirement that there be a causal connection between a violation of care and a specific and identifiable injury. Remember, the Plaintiff wants the jury to assume that "negligence per se" provides the foundation for a punitive damage claim. It's up to the defense to explain how the law truly applies.

Make your record for the appeal. We need some good law that adequately addresses the potential that exists for abuse of the legal system!

For further information regarding this article, please contact Ms. Wroten at 949.788.1790 or e-mail her at: kwroten@wrotenlaw.com

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