

NURSING HOME LITIGATION: PLAINTIFF'S PERSPECTIVE

Benjamin E. Baker, Jr.

THE LAW OF THE CASE

a. Alabama Medical Liability Act

In recent years, nursing home neglect and death cases have been on the rise. One reason for the rise in cases maybe attributed to the increasing age number of older members of the population. Another reason for the increase in cases maybe the government's increased role in regulating extended care facilities and the lawyer's role in helping to police the conduct of these long term care facilities. In Alabama, actions against a nursing home are governed by the Alabama Medical Liability Act of 1975 (Code of Ala. §§ 6-5-480 through 488) and the Medical Liability Act of 1987 (Code of Ala. §§ 6-5-540 through 552). (collectively the "MLA"). A number of the provisions set forth in these code sections have been validated as unconstitutional. However, the remaining provisions have a serious and practical impact on pursuing a nursing home case.

I have seen numerous lawyers preparing nursing home cases under the mistaken impression that their case was governed by the general negligence law of Alabama. However, the Alabama Supreme Court has indicated that actions against nursing homes are to be controlled by the medical liability act. *Ex parte Northport Health Services, Inc.*, 682 So. 2d 52 (Ala. 1996); *Husby v. South Alabama Nursing Home, Inc.*, 712 So. 2d 750 (Ala. 1998). If one were to assume that a nursing home case was governed by general negligence law, their case will most likely be thrown out of court for failure to abide by the strict pleading requirements and the expert witness requirements of the MLA. See, e.g. 6-5-551 and 6-5-548.

The requirements of the MLA have other significant impacts on the preparation of a nursing home case. The burden of proof placed on the plaintiff is higher than that placed upon a plaintiff in a general negligence

action. See § 6-5-548. The MLA also sets forth special guidelines related to the statute of limitations for a medical malpractice action. See, Code of Ala. § 6-5-482. Further, MLA has special venue requirements outside those of the typical venue statutes. Code of Ala. § 6-5-546. Therefore, one would be best advised to become familiar with the requirements of the MLA before pursuing any action against a nursing home.

b. State and Federal Regulations

In addition to the Alabama Medical Liability Act, one should be familiar with the state and federal regulations that govern the operation of nursing homes. Nursing homes are one of the most regulated areas by the state and federal governments. The regulations are very patient/resident friendly and therefore it is essential to review and understand these regulations to assist in the preparation and pursuit of a nursing home claim.

Primarily, the federal requirements related to nursing facilities can be found at 42 U.S.C. § 1396r. This code section is interpreted and enforced by the Healthcare Financing Administration of the Department of Human and Health Services. Two important areas of the regulations that relate to the quality of nursing home care are the survey and certification procedures found at 42 C.F.R. part 488 and the requirements for long term care facilities located at 42 C.F.R. part 483. In addition, the State of Alabama has adopted its own set of regulations which are very similar to those found in the federal regulations. The Alabama nursing home regulations can be found at Ala. Admin. Code § 420-5-10 et. seq.

In the early 1970's the United States Congress enacted the Nursing Home Reform Act (NHRA) in response to widespread nursing home abuse. The federal legislature created the Omnibus Budget Reconciliation Act of 1987 (OBRA 87) for nursing homes seeking reimbursement from Medicare and Medicaid. The federal government is able to require nursing homes to meet federal regulations if they expect to receive reimbursement through Medicare and Medicaid. OBRA 87 requires that nursing homes must "care for residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident" and "obtain or maintain the highest practicable physical, mental and psycho-social well being of each resident in accordance with a written plan of care. . . ." 42 U.S.C. § 1396r(b) (1) and (2) (1998).

The state and federal regulations cover a wide variety of areas related to nursing home facilities and the care that should be provided to residents. Both state and federal regulations are very comprehensive and detailed. The regulations cover everything from how a care plan should be developed to staffing requirements to the requirements for periodic assessment of residents. Therefore, one should become familiar with the regulations to assist them in establishing the minimum standard of care that should be afforded to residents of a nursing home.

II. PRE-SUIT INVESTIGATION

a. Resident's Chart

The primary pre-suit investigation of a nursing home claim is to obtain the resident's nursing home chart and other hospital or physician medical records. The nursing home chart is key evidence in substantiating an injury or death claim. Under state and federal regulations a nursing home is required to keep certain information related to resident care. In certain instances, resident care is to be documented in nurse's notes on a daily basis and in other instances when a resident's condition changes. Also, regulations require a number of disciplines to work together to create an entire picture of the resident's life in a nursing home and the care to be provided them. The disciplines that interact together include a skin care professional, a dietician, a social worker, a medical physician, and general nursing care. The medical records also document the amount of food eaten by a resident as well as their daily bodily output. Basically, the resident's entire life should be documented in their chart. Therefore, certain deficiencies related to the charting and the documented care can and often indicate a lack of care being provided to the resident in violation of the appropriate standard of care and state and federal regulations, and the resident's care plan.

Unlike other medical malpractice cases, nursing home residents have the advantage of being able to review their medical records within 24 hours. 42 C.F.R. § 483. 10(b)(2) provides that a resident or his legal representative has the right to access all of the medical records within 24 hours. Further, the regulations state that a resident or his legal representative may obtain copies within two working days. Alabama has a similar regulation found at Ala. Admin. Code § 420-5-10-.05 (3)(b).

b. Deficiency Reports

Another important pre-suit discovery tool is to obtain the reports of the surveys conducted by the Department of Health, Division of Licensure and Certification regarding its inspections of the particular nursing home. These inspections are conducted by both state and federal agencies to ensure that the nursing home facility is meeting the state and federal requirements for its operation. The inspections usually occur on a random and unannounced basis and the inspectors usually take a random selection of residents to review. The inspectors will often write deficiencies they find in the nursing home's operation and with particular residents' care. The resident deficiencies will be written up on an anonymous basis, but will set forth detailed deficiencies in the nursing home's care of the resident. In response to these inspections and/or deficiencies, the nursing home is required to respond and provide a proposed remedy for the deficiency. This information can be helpful for your expert in determining whether there is a systemic problem throughout the nursing home related to resident care and/or operations

c. Former Employees

Another typical source of pre-suit information can be found with prior employees. Nursing homes are notorious for a high turn over rate in its employees, especially certified nursing assistants (CNA's). Nursing care is typically provided by registered nurses, licensed practical nurses and CNA's. The certified nursing assistants provide most of the actual day-to-day hands on care of the resident. Typically, the CNA will undergo a two week training course before beginning work at a nursing home. The CNA is also trained periodically through in-service training sessions at the nursing home. Unfortunately, the CNA's are usually under paid and over worked. In some instances, one CNA maybe responsible for the day-to-day needs of 10 to 20 residents.

If the CNA's can be located they are typically a wealth of information related to the typical policies and procedures used at the nursing home and any deficiencies that may exist in the overall care of residents at the nursing home. This is a indispensable source of information and evidence for building a claim against a nursing home. While these persons can provide a wealth of information during pre-suit discovery, there importance should not be overlooked during formal

discovery after suit has been filed. Often times, a video deposition of a former CNA can be devastating to a nursing home.

III. TYPICAL CLAIMS

a. Negligence/Wantonness

In most cases, a claim will relate to some type of negligent or wanton nursing care. In certain instances, claims may relate to intentional mistreatment of elderly residents. However, most claims will relate to negligent or wanton conduct in caring for a resident. While the term negligent and/or wanton conduct is very broad, some of the more specific claims related to the breach of the standard of care will relate to:

- failure to properly train the nursing staff;
- malnutrition of residents;
- failure to properly supervise the nursing staff;
- failure to properly supervise and/or monitor residents;
- failure to provide resident care in accordance with the care plan;
- failure to prevent decubitus ulcers and/or prevent the worsening of decubitus ulcers;
- failure to properly staff the nursing facility;
- failure to terminate an employee with known propensities to commit negligent, wanton and/or intentional acts;
- failure to notify family and/or sponsor of a resident's changing condition;
- failure to provide appropriate medical treatment to a resident and/or transport a resident to a hospital for treatment;
- failure to properly administer medications;
- failure to recognize side effects of medications;
- violations of OBRA and/or applicable state regulations;
- failure to properly monitor a resident with a history of abusive behavior in order to prevent injuries to other residents;
- failure to prevent foreseeable falls;
- sexual and/or physical abuse.

This is a list of common type claims that is certainly not inclusive. Once you have obtained a resident's chart, it should be apparent which of what potential areas of neglect may exist. However, since a nursing home claim in Alabama falls under the Alabama Medical Liability Act, it is necessary to have an expert in the case. See *Levesque v. Regional*

Medical Center Board, 612 So. 2d 445 (Ala. 1993). An expert can help the attorney determine the exact nature of any substandard care.

b. Breach of Contract

Another typical claim whether in the injury or wrongful death context is a breach of contract. In almost every instance, a resident and/or their sponsor will sign a contract for care with the nursing home. Inevitably, the contract states, in effect, that the nursing home will provide appropriate care. If you prove that the nursing home, in fact, did not provide the necessary and appropriate quality care, then you have shown that the nursing home has breached its contract to provide care.

A breach of contract claim becomes very important in a wrongful death action. Under Alabama law, a wrongful death claim will allow an award of punitive damages only. The decedent's personality, family, prior injuries or suffering are not necessarily relevant. More importantly, mental anguish, pain and suffering are not compensable under a death claim. However, a breach of contract claim may provide an opportunity to claim certain compensatory damages, like pain and suffering, that would otherwise be precluded under a general wrongful death action.

§ 6-5-452 of the Alabama Code provides that an action for breach of contract survives the decedent. Further, the primary legal basis for a breach of contract claim in a wrongful death context can be found in *Benfield v. Aquaslide-N-Dive Corp.*, 406 So. 2d 873 (Ala. 1981). Additionally, use of the breach of contract theory simultaneously with the wrongful death claim under negligence can help convey to the jury the human side of the decedent prior to his or her death and also assist in communicating to the jury the suffering that the resident would have undergone prior to their death. This theory is often overlooked by the plaintiff's attorney when filing an action in the State of Alabama. Therefore, it is important when obtaining a resident's chart to also request a copy of any administrative records that relate to the resident and include any contracts with the resident and/or his sponsor.

c. Alabama Medical Liability Act § 6-5-551

Pleading any of the above referenced claims must be done with specificity. See, Ala. Code § 6-5-55 1. Nursing home cases as with other medical malpractice cases require that the plaintiff's allegations be set forth with "a detailed specification and factual description of each act and omission alleged by plaintiff to render the healthcare provider liable to the plaintiff." Ala. Code § 6-5-551. The plaintiff is almost required to plead a nursing home claim with as much specificity as would be required in a fraud case. Further, the plaintiff will not be allowed to present any evidence at trial absent the specific act or omission being plead in the complaint. Ala. Code § 6-5-55 1. (however, See Baptist Medical Center Montclair v. Wilson, 618 So. 2d 1335 (Ala. 1993). Therefore, the practical import of § 6-5-55 1 requires the plaintiff's attorney to allege, in as much detail as possible, as many specific acts as can be determined from the existing evidence to ensure that the plaintiff's claim will be able to be presented at trial. Also, § 6-5-55 1 requires additional rules related to amending the complaint outside of the general rule on amendment. In order to amend a medical malpractice complaint, the amendment must be done at least ninety (90) days before trial. Thus, the plaintiff's attorney needs to take special care to have this date calendared so that any additional evidence or claims that arise during discovery can be properly added to the complaint.

IV. PRACTICAL TIPS

a. Discovery

A general practice in all nursing home suits is to file requests for production and interrogatories along with the complaint. Filing written discovery with the complaint allows me to get a head start in obtaining information from the defendant to assist me in further substantiating the plaintiff's claims. One of the most important items to obtain includes the names, addresses and phone numbers of all employees that would have provided care to the plaintiff during the specified time period made the basis of the complaint. Most nursing homes are required to maintain this information on file for a certain period of time even if the employees are no longer with the nursing home. This information will provide you with a clear picture of the persons providing care to your plaintiff and will allow you to determine what employees are not longer with the nursing home. Additionally, you will want to find out how many people were

employed during this specified time period and/or the number of persons working your plaintiff's wing of the nursing home as part of your understaffing claim.

Additionally, each nursing home has its own set of written policies and procedures to be followed in providing care to the residents. It is imperative to obtain copies of all written policies and procedures for providing resident care. It is also imperative to obtain any video taped instructional information provided to the nursing staff as well as copies of any in-service training material provided to the nursing staff during your specified time frame. However, please be aware that if you have not specifically plead certain acts or omissions, it is unlikely that you will be allowed to discovery all policies and procedures. In most cases, the nursing home can provide you with an index of all training materials and policy and procedure manuals. This will allow you to narrowly tailor your discovery requests and avoid the necessity of court intervention in obtaining your discovery.

Paper discovery will also allow you to determine which individuals should be deposed regarding the allegations of your complaint. You will also want to include at least one 30(b)5&6 deposition to cover certain policies and procedures and training methods used at the nursing home. Often times, a nursing home will produce a corporate representative who is not necessarily familiar with all areas you wish to inquire about and therefore you end up wasting time. I have found it to be beneficial to serve separate 30(b)5&6 corporate representative deposition notices on specific areas. For example, I will file one notice related to corporate administrative procedures, another notice on nursing policies and procedures, another notice on the development of the nursing manual and training.

b. Pattern and Practice Evidence

Unfortunately, the Alabama Medical Liability Act as amended essentially precludes plaintiffs from obtaining pattern and practice evidence in nursing home or any other medical malpractice cases. See, Ala. Code § 6-5-55 1 The practical effect of § 6-5-55 1 is to preclude a plaintiff from obtaining evidence to support punitive damages against a healthcare provider.

Prior to the most recent amendment to § 6-5-551, the Alabama Supreme Court in *Ex parte McCullough*, 747 So. 2d 887 (Ala. 1999), widened the plaintiff's ability to obtain pattern and practice evidence, but this case has effectively been reversed by the recent amendment to § 6-5-551. Additionally, the new § 6-5-551 states that all discovery issues are governed by the MLA. In the past, healthcare providers have raised numerous privileges to prevent the plaintiff from obtaining certain quality assurance information. An argument can now be made that this information is no longer protected in a civil action for medical malpractice since the newest statute states that all discovery is governed by the MLA. In any event, § 6-5-551 substantially limits the plaintiff's ability to conduct discovery in a medical malpractice case. It clearly prevents a plaintiff from ever obtaining a punitive damage award against a medical healthcare provider absent some intentional act. Only time will tell if this statute meets state and/or federal constitutional muster.

c. Experts

The MLA requires that an expert be used to establish that a healthcare provider breached the standard of care. *Levesque*, supra. In the nursing home context, the general breach of the standard of care will be related to nursing care. The medical liability act requires that an expert be a similarly situated healthcare provider. There are numerous cases discussing this issue and one of the most recent cases is *Crown Investments, Inc. v. Reid*, 740 So. 2d 400 (Ala. 1999).

In *Crown*, the Supreme Court discusses Ala. Code § 6-5-548 which provides the test for a "similarly situated healthcare provider". Essentially, the healthcare provider must have practiced hands on nursing care in the one year preceding the incident made the basis of this suit. The case also seems to suggest that the nursing expert must have practiced as a nurse in a nursing home. Prior decisions such as *Husby v. Southern Alabama Nursing Home, Inc.*, 712 So. 2d 750 (Ala. 1998), have indicated that a nursing expert need only have practiced in the general area of nursing. However, the *Crown* case seems to follow suit with recent decisions of the Supreme Court indicating that the expertise of a similarly situated healthcare provider must be even narrower, i.e. a nurse experienced in nursing home care. Again, the MLA applies a higher burden or proof on a plaintiff and the practitioner should be familiar with these additional requirements.

In addition to a nursing expert, it may be necessary to employ a medical physician on the issue of proximate cause. The necessity of a medical doctor becomes important in a wrongful death action to establish the nexus between the alleged malpractice and the cause of death. In some cases the treating physician will provide the necessary link between the malpractice and the cause of death. In other cases it will be necessary to hire an outside expert to review the records and establish the actual cause of death. Again, a nursing home case, being a medical malpractice action, requires a very detailed approach in proving each element of the plaintiff's claim in order to avoid a summary judgment or a dismissal of the claim.

V. CONCLUSION

A nursing home case can become very complicated and very document intensive. Due to the incredible amount of paperwork, the plaintiff's attorney has to be willing to dedicate himself to a thorough involvement in the case to ensure that it is properly prepared. It is also necessary to be familiar with the additional requirements placed on a plaintiff bringing a nursing home claim by the Alabama Medical Liability Act. An attorney bringing a nursing home action should also be familiar the applicable state and federal regulations applied to the nursing home industry. Essentially, preparing a nursing home case from the plaintiff's perspective requires that the plaintiff's attorney bring together numerous resources to create a concise and understandable package that can establish and prove the nursing home negligence to a judge and/or jury.