# THE FUNDAMENTALS of NURSING HOME ABUSE & NEGLECT LITIGATION IN ALABAMA

**I. Introduction.**

Currently, there are approximately 27,000 persons who reside in one of 228 licensed nursing homes in the state of Alabama. Because of issues with the quality of care and the limitations of the state regulatory agency, many families look to litigation as a way to fight back and protect the rights of nursing home residents. Too often, nursing home residents are helpless victims of nursing facilities that place profits over people. Through litigation, these persons have a voice. Even individual claims have been successful in unveiling the sources of systemic problems and bringing attention to these problems may result in an overall improvement in the quality of care for residents.

**II. Common Forms of Abuse and Neglect.**

In long term care settings there can be a variety of situations that result in injury to residents. Some neglect may occur over a long period of time. In many situations, the injuries occur because of a systematic failure of the administration, as opposed to neglect by an individual staff member. Typically, when we can identify an injury to a resident, we will likely find other residents that have suffered similar injuries as well. Some of the most common situations concern pressure sores, malnutrition, dehydration, falls, medication errors, and general neglect or abuse.

**A. Pressure Sores.**

Pressure sores (also known as bedsores or decubitus ulcers) are areas of skin damage resulting from a lack of blood flow due to friction and/or pressure. When residents are immobile or limited in their ability to move, they are at risk for developing pressure sores or areas of skin breakdown due to friction and/or the restriction of blood flow to certain areas. Pressure sores usually develop below the waist, although they can occur anywhere on the body. They tend to occur over bony projections where pressure is concentrated, such as the lower back, tailbone, feet, elbows, and hips. They may occur where pressure from a bed, wheelchair, cast, splint, or other hard object contacts and presses on the skin.

A nursing home should take care to prevent the development of pressure sores by taking care to turn residents often and utilize devices that eliminate pressure to problem areas. If the development of a pressure sore is unavoidable due to some medical condition, then the nursing home must identify the problem and take action to promote healing, including proper dressing, hydration, nutrition, and evaluation by a physician. Residents that suffer from diabetes and vascular disorders are at greatly increased risk for pressure sores.

There are federal and state regulations that concern the prevention and care of pressure sores. These regulations provide that a nursing home must ensure that:

a) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and

b) A resident having pressure sores receives necessary treatment and services to promote healing,

prevent infection, and prevent new sores from developing.

ADPH Rule 420-5-10.10(4), 42 C.F.R. § 483.25 (c)

If a pressure sore develops, the care should consist of frequent evaluation and treatment. A certified wound care nurse should be called in to access the wound and administer treatment. Treatment usually consists of removing pressure with splints, positioning wedges, and frequent turning while dressing the wound and providing proper hydration and nutrition. A physician should evaluate and oversee the care provided. For severe pressure sores, more aggressive treatment, including debridement and use of a wound vac, may be required.

**B. Malnutrition and Dehydration**

Too often, nursing home residents suffer from poor nutrition and poor hydration. This may be the result of unappealing food, or of a reluctance or inability to eat and drink. Because of insufficient staffing at nursing homes some residents who are unable to eat unassisted are not receiving proper nourishment. The limited staff is simply unable to assist every resident that needs assistance to eat.

There are federal and state regulations that concern resident nutrition and hydration. These regulations provide that a nursing home must ensure that a resident:

1) maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and

2) receives a therapeutic diet when there are nutritional problems.

ADPH Rule 420-5-10.10(10), 42 C.F.R. 483.25(i)

The regulations also require that the nursing facility provide each resident with sufficient fluid intake to maintain proper hydration and health. ADPH Rule 420-5-10.10(11); 42 C.F.R. 483.25.

Maintaining proper hydration is critical for the health of nursing home residents. As with nutritional requirements, staffing issues have a great impact on proper hydration. Nursing home residents often need to be reminded to drink fluids or need help taking fluids. If a facility is understaffed, then this care may not be provided. It is common to see valid claims against nursing homes that are based on, or related to, inadequate hydration or nutrition. When this situation presents itself, a nursing expert should look closely at the record to detect any changes in weight, and review the records to determine if the staff was properly assisting resident with the activities of daily living.

**C. Falls**

Falls resulting in injuries to residents are one of the most common problems at nursing homes. Although some resident falls may be unavoidable, the nursing staff has a responsibility to avoid accidental injuries to residents. The federal and state regulations concerning accidental injuries, including resident falls, state that a facility must insure that:

1) the resident environment remains as free of accident hazards as possible; and

2) each resident receives adequate supervision and assistance devices to prevent accidents.

Falls may occur at night when a resident attempts to exit the bed, when a resident is walking in the halls of nursing home, or when the resident is assisted by a nurse or an aide. On admission and at quarterly intervals, the nursing home must assess each resident's risk for falls and take appropriate action. Interventions may include placing a resident on a lowered bed, using bed rails, or padding the floor in a resident's room. Alarms that alert the staff when a resident moves from his or her bed or chair and needs assistance are also helpful in preventing falls. Probably the most effective fall prevention technique is frequent monitoring of residents and prompt replies when a resident calls. This can only be accomplished with proper staffing.

**D. Medication or Reporting Errors**

In a nursing home setting, the majority of residents are totally dependent on the staff to provide proper medication at the times ordered by the physician. Many residents' lives depend on the accurate administration of medication. Unfortunately, medication errors can be a frequent occurrence. Either a resident does not receive the appropriate medication or receives an incorrect dosage. Nursing homes also may have difficulty keeping track of tests results that were ordered by a physician or reporting the results or significant changes in a resident's condition to a physician. When this occurs, the delay in treatment can have catastrophic results for fragile residents.

Federal and state regulations provide that any long term facility must insure that:

1) it is free of medication error rates of 5% or greater, and

2) residents are free of any significant medication errors.

ADPH Rule 420-5-10.10(10), 42 C.F.R. 483.25(m)

In recent years, there has been a rise in misuse of medications for nursing home residents. Medications that are prescribed "as needed" may be improperly administered by the nursing staff. This may result in over sedation or overdosing of narcotic and/or psychotropic medications. This may often be another horrible side effect of understaffing. Because of insufficient staff, residents are sedated so that they will not request or require assistance from the staff. This conduct is expressly prohibited as the applicable regulations provide that a resident has the right to be free from any physical or chemical restraint imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms. ADPH Rule 420-5-10.07(1), 42 C.F.R. 483.13(a).

If you suspect medication errors, the most important document to review in the patient chart is the "Medication Administration Record" or MAR. This record should document all medications that have been provided to the resident including regular prescribed medications and as needed or prn medications. Careful review will often reveal mistakes or omissions in medication administration.

The staff of the nursing home also has an affirmative duty to notify a resident's representative and/or family and consult with the resident's physician when there is an accident resulting in injury or significant changes in a resident's condition. ADPH Rule 420-5-10.05(k), 42 C.F.R. 483.10(b)(11). This duty is critical because it allows the family or a physician to make decisions about the proper interventions to treat a resident's clinical symptoms and/or whether the resident should be transported to a hospital for assistance.

**E. General Neglect or Abuse.**

Other types of abuse or neglect at nursing homes can come in the form of assaults by other residents or staff members, allowing residents to elope from facilities, verbal or emotional abuse, unsanitary conditions, or staff members that simply ignore residents' pleas for help.

The state and federal regulations provide that a resident has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion. ADPH 420-5-10.07 (1)(b); 42 C.F.R. 483.13(b). In an effort to ensure proper treatment of residents, the facility must "develop written policies and procedures that prohibit mistreatment, neglect and abuse of residents." ADPH 420-5-10.07 (1)(c); 42 C.F.R. 483.13(b)

It is critically important for a nursing home to thoroughly screen potential employees to learn of any negative history, and equally important to continuously assess the performance of its employees. If this is not done, it places every resident in the facility at risk for serious injury or death. The facility must also ensure that alleged incidents of mistreatment, neglect or abuse are reported immediately to the administrator of the facility. The facility must further be able to produce evidence that the alleged violation was investigated thoroughly, and must prevent further potential abuse while the investigation is ongoing. The results of this investigation must be reported to the administrator within five working days of the incident. If the alleged violation is verified then appropriate corrective action must be taken. ADPH 420-5-10.07 (1)(d-f), 42 C.F.R. 483.13(c)(4)

**III. The Alabama Medical Liability Act**

**A. Burden of Proof.**

In Alabama, claims against nursing homes are controlled by the Alabama Medical Liability Act (AMLA). In order to prevail on a negligence claim governed by the AMLA, a plaintiff must produce evidence that establishes 1) the appropriate standard of care, 2) the nursing home's deviation from that standard and 3) a proximate causal connection between the act or omission constituting the deviation and the injury sustained by the plaintiff.

The AMLA was originally enacted in 1987, but has been amended by several "tort reform" movements in 1992, 1996 and 2000. Section 6-5-548(a) of the AMLA establishes an increased burden of proof for plaintiffs in nursing home cases:

> In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider (nursing home) for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

In order to meet this burden of proof, a plaintiff must usually provide **expert** testimony in support of his or her claims. To be qualified to testify as to the standard of care that a defendant allegedly breached, an expert must come within the definition of a "similarly situated health care provider" under § 6-5-548(b) or § 6-5-548(c), depending on the situation.

Also, a plaintiff must prove – through testimony of a currently licensed physician – that the nursing home's violation of the standard of care "probably caused the injury or death in question." Ala. Code § 6-5-549.

**B. Restrictions on claims imposed by AMLA**

In addition to requiring expert medical testimony, the AMLA has given the nursing homes a distinct advantage when defending claims. The AMLA places restrictions on where a lawsuit against a nursing home may be filed, prohibits the discovery of any information concerning a nursing home's liability insurance, and requires that plaintiff's complaint provides a detailed specification and factual description of each and every act that injured the resident. Section § 6-5-551 effectively prohibits a plaintiff from discovering evidence of "other acts and omissions" or other similar incidents unless such acts or omissions are detailed with specificity in the complaint. See *Ex Parte Ridgeview Health Care Center,* 786 So. 2d 1112 (Ala. 2000) and *Ex parte Coosa Valley Health Care, Inc.,* 789 So. 2d 208 (Ala. 2000).

**IV. Government Regulations.**

In most cases involving long term care, the nursing home is paid completely or in large part by public healthcare benefits. In Alabama, most

nursing home residents are Medicaid and Medicare recipients. About 68% of Alabama nursing home residents are covered by Medicaid for the normal everyday care that the resident requires. This care includes eating, bathing, dressing, toileting, general nursing care, and prescription medications and supplies. Total monthly costs are usually between $ 4,000 and $ 6,000 per month. In Alabama, Medicare pays for only about 12.5% of nursing facility care. Medicare does not pay for daily long-term care service, however Medicare will pay for skilled care in a nursing home under certain circumstances.

Because nursing homes are paid largely through these governmental healthcare benefit programs, they are subject to numerous Federal and State Regulations. These regulations are extensive and specify the type of care and documentation of care necessary for a nursing home to qualify for payment. The Federal Regulations governing nursing homes are set forth in the Omnibus Budget Reconciliation Act of 1997, also known as the Nursing Home Reform Act. The Federal Agency responsible for their enforcement is the Health Care Finance Administration (HCFA) of the Department of Health and Human Services. Federal nursing home regulations are located at 42 USC § 1396 (the Nursing Home Reform Act), and 42 CFR § 483 (the Requirements for Long Term Care Facilities). Alabama's nursing home regulations, which are patterned after the Federal law, are located in Alabama Administrative Code § 420-5-10. See: http://www.adph.org/HEALTHCAREFACILITIES/assets/NursingFacilitiesRules.pdf

The state and federal regulations create standards that have heightened the expectations of nursing home care, from minimum maintenance, to the goal of maintaining the "highest practicable physical, mental and psychosocial well being" of nursing home residents. 42 C.F.R. § 483.25. These regulations, in part, require:

- Adequate numbers of nursing personnel to provide for the needs of the resident;
- Adequate amounts of food, supplies, equipment and medication;
- Competent nurses, aides, and orderlies who are screened when hired and who have been monitored throughout their employment to eliminate unfit personnel;
- Adequate and systematic planning to create an individualized plan of care for each resident;
- Continuous systemic assessment of each resident and notification of the attending physician when necessary;
- A record keeping system that accurately documents the clinical condition and progress of residents as well as delivery of care; and
- Adequate quality assurance programs that identify and correct care deficits.

If a facility fails to provide these minimum requirements then residents who are unable to help themselves may suffer serious injury or death. The Alabama Department of Public Health, through its Division of Provider Services, is responsible for inspecting nursing homes in Alabama to insure compliance with state and federal regulations.

Under Federal Law, nursing homes in Alabama that participate in the Medicaid and Medicare programs are to undergo an annual survey/inspection and certification process. The purpose of the survey is to assess whether the type of care intended by the law and regulations, and as needed by the resident, is actually being provided. Nursing homes must be in substantial compliance, or they can be denied payment for new admissions, civil monetary penalties can be assessed, Medicaid and Medicare certificates can be revoked, residents can be transferred, and temporary management can be imposed on the facility. Certification surveys are, by law, to be unannounced, but in reality the timing of these surveys is often known to the facilities. Surveyors will also conduct a complaint investigation when there is evidence that a resident has suffered a substantial injury or death. In these instances, the facility is unable to prepare for the survey and, in many cases, numerous deficiencies are documented.

The reports generated from surveys of facilities in Alabama can be obtained from the Alabama Department of Public Health, Division of Provider Services, P.O. Box 303017 Montgomery, AL 36130-3017, and recent reports are available online at http://dph1.adph.state.al.us/Deficiencies/(S(e43d5l554b1kdcmboqcs3z55))/default.aspx. Additional information concerning specific surveys is available by making a request pursuant to the Freedom of Information Act. A quick evaluation of a particular home's compliance with state and federal regulations can be found at the Medicare web site. The web site is located at: www.medicare.gov\NHCompare\home.asp.

**V. Investigating Nursing Home Injuries.**

The first step in investigating an injury at a nursing home is to obtain a copy of the resident's nursing home records, medical records, and, if appropriate, the death certificate. The applicable federal regulation, 42 C.F.R. § 483.10(b)(2), provides that a resident or his or her legal representative has the right to access all of their nursing home records within 24 hours, excluding weekends and holidays. Further, the regulation provides that the resident or legal representative may obtain copies of nursing home records upon two working days notice to the facility. In a wrongful death case against a nursing home, obtaining the records can be more difficult. Typically, a personal representative of the resident's estate or an administer ad litem must be appointed by the probate judge before the

nursing home will release the records.

Records from the nursing home, hospitals, and all treating physicians should be obtained, because they may demonstrate that the nursing home was not properly or accurately documenting the resident's condition. Discrepancies may also indicate that the nursing home altered or falsified records. Once the records have been obtained, it is usually necessary to have a nurse familiar with long term care issues review the records. If a nurse finds that there are care issues, then treating physicians or physician experts should be asked to provide opinions about the results of any substandard care.

In addition to records, valuable information can be obtained from former nursing home employees and other families with residents in the nursing home. These sources of information can be invaluable in demonstrating that the injury to a resident was not a mistake of one person, but instead the systemic failure of the nursing home as a care facility.

If you suspect that a resident has been abused or neglected you should immediately contact one or more of the following agencies:

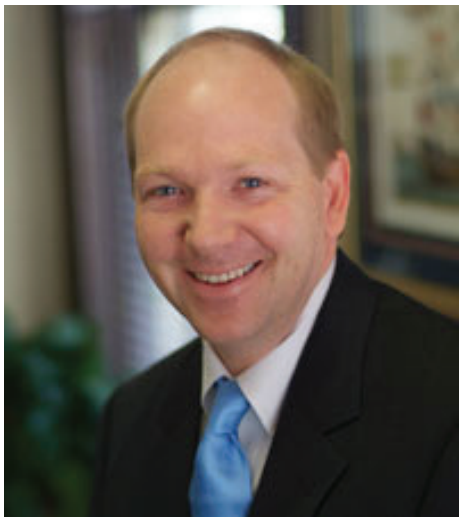
- Alabama Board of Nursing (800) 656-5318
- ADPH Healthcare facilities Complaint Line (800) 356-9596
- Alabama Department of Senior Services (800) 243-5463
- DHR Elder Abuse Hotline (800) 458-7214

**VII. Arbitration**

In an effort to insulate their businesses from litigation arising from poor resident care, many long term skilled care facilities and management companies have required residents and/or their families to sign arbitration agreements before admitting a resident. This practice effectively deprives the resident or his or her family from pursing a claim in court of law and denies the right to jury trial. Although arbitration can provide a remedy for a wrong, there are procedural limitations that make it more difficult to prove a claim, and the arbitration process may not provide fair compensation for an injury or adequately punish wrongdoing. Arbitration is also a more expensive method of pursuing a claim, as the cost of the arbitrator is paid by the parties.

Unfortunately, the Alabama Supreme Court has upheld the validity of most arbitration agreements. Most of the cases before the court involve the execution of an admission agreement, including an arbitration clause, by the resident's representative or family member. Although the court has stated that "a nonsignatory to an arbitration agreement cannot be forced to arbitrate her claims," they have upheld arbitration agreements signed only by persons considered to be representatives of nursing home residents. *Cook's Pest Control Inc., v. Boykin*, 807 So. 2d 524, 526 (Ala. 2001). In situations where the resident is not incapacitated and an admission agreement has been executed by an authorized representative with apparent authority, the Court has consistently enforced arbitration clauses included in the agreements. See: *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004); *Briarcliff Nursing Home, Inc. v. Turcotte,* 894 So. 2d 661 (Ala. 2004); *Carraway v. Beverly Enters. Alabama, Inc.,* 978 So. 2d 27 (Ala. 2007); and *Tennessee Health Mgmt., Inc. v. Johnson*, 49 So. 3d 175 (Ala. 2010). However, where the resident is not competent or is incapacitated at the time of admission and is unable to provide consent, the Court has not enforced arbitration agreements contained in the admission contracts signed by representatives. See: *Noland Health Servs., Inc. v. Wright,* 971 So. 2d 681 (Ala. 2007); *SSC Montgomery Cedar Crest Operating Co. v. Bolding*, 130 So. 3d 1194 (Ala. 2013) and *Diversicare Leasing Corp. d/b/a Canterbury Healthcare Facility v. Hubbard*, [1131027] (Ala. 2015).

It is expected that the validity of arbitration agreements will be an issue that continues to arise in nursing home cases. At this time, there are efforts at the state and national level to enact legislation or revise regulations to forbid mandatory arbitration agreements in nursing home admission contracts. Until these efforts are successful, it will be necessary to continue to stay up to date on the cases involving arbitration agreements in admission contacts and carefully analyze your facts to determine if arbitration can be avoided.



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