Nursing & Assisted Living Facility *Professional*

"NEWS AND VIEWS YOU CAN REALLY USE"

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SENT EACH MONTH TO YOU AS A MEMBER OF THE HEALTHCARE HEROES

THE HAT ADVANTAGE by Rebecca Adelman

Medical Malpractice Update: 2015 Up To Date

Welcome to 2016 and the sixth year of The HAT Advantage. As we look forward to the New Year, we also reflect on our valued partnership and what was shared in 2015. The last year may have delivered its share of challenges to the healthcare industry and tragedies to the world, but in 2016, we anticipate to "learn from yesterday, live for today, hope for tomorrow. The important thing is not to stop questioning."

Therefore, in that very spirit, this month's HAT Advantage is a compilation of significant case opinions from Tennessee in 2015, so that you, the HEALTHCARE HEROES, who are committed to the nursing and assisted living industry, can "learn from yesterday, live for today, and hope for tomorrow." Next month we will discuss significant statutory updates from 2015.

ALERT for 2016: Soon you will enjoy HAT's new legal blog "Up-To-Date" and our alternative blog "Mad Hatter" both with informative legal content and with a few twists of fun and adventure along the way. Stay tuned!

It has been a rewarding experience working with the healthcare heroes for the last five years. May this New Year bring forth many rewarding moments, in the healthcare industry, for us to share. The HAT Advantage salutes you!

Significant Opinions in 2015

The Required of Adjudication of Incompetency for Tolling Statute of Limitations

Johnson v. Uhs of Lakeside, LLC, No. W201501022COAR3CV, 2015 WL 9426034 (Tenn. Ct. App. Dec. 23, 2015)

Plaintiff filed a health care liability action on behalf of her deceased husband. Plaintiff provided pre-suit notice more than one year after the cause of action accrued and subsequently filed a complaint. Defendant filed a motion to dismiss based on the applicable one-year statute of limitations. Plaintiff argued that her husband had been "adjudicated incompetent" within the meaning of Tennessee Code Annotated § 28-1-106 and that the statute of limitations was accordingly tolled. The trial court dismissed Plaintiff's case with prejudice finding that the statute unambiguously required a judicial adjudication of incompetency in order to toll the statute of limitations, and Plaintiff's husband had not been judicially adjudicated incompetent within the meaning of the statute at the time the cause of action accrued.

The Court of Appeals analyzed the statutory history of TCA § 28-1-106 to determine the meaning of "adjudicated incompetent" which has not yet been analyzed by an appellate court. In 2011, the statute was amended to include the language "adjudicated incompetent," which replaced the language "unsound mind." The Appellate Court analyzed whether this statute change means that the person must be deemed incompetent by a court for the statute to be tolled. The Appellate Court held that a plaintiff's mental incompetency must have been judicially adjudicated at the time his cause of action accrued. Therefore, in the case at hand, the Court held that the statute of limitations expired because at the time the fall, the resident had not been judicially adjudicated "at the time his cause of action accrued."

HAT ADVANTAGE: Plaintiffs consistently allege that the statute of limitations is tolled for an extended period of time due to incompetency in order to avoid dismissals. Plaintiffs can no longer simply allege incompetency, they must have a judgment to withstand a Motion to Dismiss. A heavier burden for Plaintiffs. The opinion will likely be appealed to the Tennessee Supreme Court.

The Need to Show Prejudice in a Motion to Dismiss

Hunt v. Nair, No. E201401261COAR9CV, 2015 WL 5657083 (Tenn. Ct. App. Sept. 25, 2015)

The appeals court evaluated (1) whether the Plaintiff's medial authorization was compliant with HIPAA and whether any deficiency would merit dismissal; (2) whether failure to attach the pre-suit notice and medical authorization merits dismissal; and (3) whether insufficiency of process merits dismissal. Each of the court's analyses came down to whether there was actual prejudice to the defendant. The medical authorization was deficient in its failure to contain specific language specific in the CFR but the court found no prejudice to defendants. Since defendants were on notice of the suit, the court found there was substantial compliance because there was no prejudice.

The court stated that "a defendant can strengthen a motion to dismiss or avoid an unnecessary challenge by making reasonable efforts to use the plaintiff's medical authorization to acquire the medical records prior to moving to dismiss for failure to comply with the Tennessee Health Care Liability Act." Thus, if a defendant tries to use an authorization, and the entity refuses to release the records, then there would be an actual prejudice to defendant and more likely a favorable decision on a Motion to Dismiss.

HAT ADVANTAGE: Defense counsel has an increased burden to make extended efforts to obtain records or risk a good dismissal argument for lack of prejudice.

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Pathway to Rehabilitation Excellence

By Lisa Chadwick RN, MS
Director of Risk Management

What we have here is a "Failure to Communicate"

Effective communication is a challenge that affects all areas of health care. Often times the lack of communication alone will precipitate a resident harm event. How do you ensure that all the care providers have the necessary information to work with your residents? The complex medical diagnoses and surgical procedures that we commonly care for these days require more specialized care than in the past. How do you ensure that due to ineffective communication, the well-intended staff person does not inadvertently provide a service that could cause harm? Consider some of these special situations.

We should all have a falls policy and specific guidelines of what to report, who to report to, how to care for a resident after a fall. Some residents are recurrent fallers, those present specific challenges in planning for care delivery. Consider the resident that is now taking an anticoagulant, coupled with a fall; they are now at an increased risk for injury. What can initially present as an innocuous injury could develop into something more serious and in some cases deadly if we are not diligent in following up. In patients who are on an anticoagulant regimen, there are reported cases where a minor head "bump" results in a subdural bleed several days after the fall. The increased risk from bleeding can affect any other major organ and increase the severity of injury from an initially no injury fall. In a recent case in Texas, a 69 year old resident fell and was reported to have no injuries from the fall except for purple bruising on her right buttock. More than 24 hours after her fall she was admitted to a hospital with internal bleeding from blunt-force trauma in her fall. She had a retroperitoneal bleed. Residents who take anticoagulants need to be monitored more closely and frequently after a fall. Can you be certain that all the care providers are aware that resident is on anticoagulant therapy thus putting them at increased risk for injury? Every care provider should have this information which could alert them to minor changes and allow them to be able to pass along a change in status to correct medical personnel and prevent an injury from extending.

Residents are NPO from time to time for various different reasons. Without proper communication, the helpful staff member (or in some cases a Volunteer) may deliver a cup of water to a resident who should be NPO. It's not only important for staff to know the NPO status, but why the resident is NPO. Do they need to be on the lookout for signs and symptoms of aspiration? Was the status related to an upcoming test or procedure that may need to be postponed or canceled? How is

NPO communicated to all the care providers in your facility to prevent this from happening?

So many other circumstances should be communicated, "Hard of hearing", "no BP or lab sticks" in a certain limb, "droplet isolation", "resident is blind", even code status. How does your facility share this information with all the care providers?

We do have a special challenge in healthcare to provide effective communication while protecting confidential information. There has to be an acceptable balance. Residents have the right to privacy in treatment and personal care. They have the right to keep records confidential and private. However, anyone providing care must be aware of special circumstances that place a resident at risk for increased injury.

One of our greatest challenges is effective and complete communication. As the direct care provider, I should know special circumstances, but communicating out to the team is not often easy. Think of all the persons who come into contact with residents on any given day. Are your residents really safe from unintentional harm because the staff was not aware of a limitation? I challenge you to review your facility's policies and ensure that all direct care providers have necessary medical information to be able to pass along any minor change in status that might otherwise be overlooked.

Resource: Legal Eagle Eye Newsletter July 2015 Vol 23 No7

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To The Healthcare Heroes
By Chip Kessler

THE HEALTHCARE HEROES

It's a new year and with it, a brand-new name for my column here in the pages of *Nursing & Assisted Living Facility Professional.* What was formally "Kessler's Corner" takes on this new title as we seek to further recognize and reward the great women and men that make up the staff in our nation's assisted living and nursing facilities, as well as those that work in the management companies and ownership groups of these healthcare facilities.

Accordingly, my question here in January 2016 is quite simple: are you ready to accept your position as a member of The Healthcare Heroes? To follow-up let me also pose these following statements and see if you agree- do you believe it's time that you receive greater respect for the work you do on behalf of those that can no longer completely care for themselves; are you sick and tired of being looked down upon because you work in a nursing or assisted living facility (or a group associated with them) and not some other health care related situation; isn't it the point in your life that you walk around with your head held up high because you know you are one of The Healthcare Heroes!

It's my privilege to announce The Healthcare Heroes, which is a program that combines recognition for your efforts, motivation to keep you feeling really good about what it is you do, and discovery of how to become even better in your role.

Space doesn't permit me to give you all of the exciting details here, so your next step is to go to the website that provides all of the information- TheHealthcareHeroes.com where you'll be invited accept your rightful position in this ongoing discovery program.

Your journey begins at TheHealthcareHeroes.com where you'll get to meet a former **Olympic athlete** that wants to give you the opportunity to see and hear how much respect she has for what you do. Yes, you'll be asked to make an investment in this month-by-month discovery program however when you see what it is, you'll think it's a mis-print. The time is now, so again I ask: are you ready to accept your rightful position as a member of The Healthcare Heroes!

Chip Kessler is the creator and developer of over 20 staff training and development programs for nursing and assisted living facilities. He's also the author of four books. However without question, his involvement in The Healthcare Heroes is his most cherished thing. "It's time we build up and not tear down the great people working in our nation's assisted living and nursing facilities," he states.

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GETTING ON THE SAME PAGE
with Paige Hector Returns Next Month!

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No Requirement to Identify Zero Violations of Certificate of Good Faith

Davis v. Ibach, No. W2013- 02514-SC-R11-CV, 2015 WL 3451613 (Tenn. May 29, 2015).

Representative of patient filed a certificate of good faith in his medical malpractice action against treating physicians after patient died as a result of complications from a surgical procedure. Physicians filed motions to dismiss on the ground that the certificate did not comply with the statute governing such certificates on the grounds that Plaintiff's counsel did not verify the lack of violations of the certificate of good faith. Physicians appealed. The Court of Appeals affirmed. Physicians filed an application for permission to appeal, which the Supreme Court granted. The Tennessee Supreme Court held that a requirement that a certificate of good faith disclose the number of prior violations of the certificate statute does not require disclosure of the absence of any prior violations of the statute, overruling *Vaughn v. Mountain States Health Alliance*, 2013 WL 817032, and *Stovall v. UHS Lakeside, LLC*, 2014 WL 2155345.

HAT ADVANTAGE: One for the Plaintiffs.

Service by FedEx is Substantial Compliance

Arden v. Kozawa, 466 S.W.3d 758 (Tenn. 2015)

The Tennessee Supreme Court has reversed a trial court's dismissal of a health care liability lawsuit against an East Tennessee doctor and hospital, concluding that delivery of pre-suit notice of a health care liability action via FedEx is a proper method of service under Tennessee law.

Plaintiff sent pre-suit notice to the defendants via of FedEx before filing a health care liability lawsuit against his wife's former medical providers. A Tennessee statute provides that a person intending to file a health care liability action must first provide health care defendants with at least 60 days' notice of the forthcoming lawsuit and specifies that a proper method for sending this notice is through the United States Postal Service (USPS). Defendant filed a motion to dismiss on the grounds that the Plaintiff used an improper method of service of the notice. The Trial Court dismissed the case and the Tennessee Court of Appeals affirmed.

The Tennessee Supreme Court held that the use of FedEx as the carrier of the notice letters constituted substantial compliance with TCA § 29-26-121 and found that unless a health care defendant is prejudiced by the method of service, substantial compliance will suffice. Defendants showed not prejudice by the use of FedEx and the Supreme Court reversed the dismissal of the lawsuit.

HAT ADVANTAGE: Again, the Courts focus on prejudice to the defendants as opposed to strict compliance.

A QPO should not Require Conditions

Dean-Hayslett v. Methodist Healthcare, et al., 2015 WL 277114 (Tenn. Ct. App. Jan. 20, 2015)

The defendants in a healthcare liability action filed a motion for qualified protective order to meet ex parte with several listed treating physicians. After rejecting a constitutional challenge, the court granted the motion but imposed a number of conditions in the order. On interlocutory appeal, the Court of Appeals affirmed in part and reversed in part the ruling of the trial court. The conditions reviewed by the Court of Appeals were: "(1) A court reporter must be present at the ex parte interview and record all questions and answers during the interview; (2) The answers during the interview must be given under oath; (3) The interview transcript shall be filed under seal; and (4) Relevant Protected Health Information may be elicited directly or indirectly from a healthcare provider during the ex parte interview. Defendants should not attempt to elicit or discuss Protected Health Information, which is not relevant to the issues in this lawsuit. This does not restrict the Defendants or their attorneys from discussing non-substantive matters unrelated to the patient's Protected Health Information."

The Court used a *de novo* standard of review, holding that the issue was one of statutory construction. Finding that the statute was ambiguous with respect to the trial court's authority to impose conditions on a qualified protective order, the Court of Appeals struck down conditions 1, 2, and 3, which the Court held "transform the investigatory interviews authorized by the section into quasi-depositions in contravention of the substantive purpose of the section." With respect to the fourth condition, however, the Court interpreted the trial court's order limiting the interviews to "relevant protected health information" to prohibit discussion of standard of care or causation opinions during the interviews.

The Court held that the statute is limited to protected heath information and "does not extend to opinions regarding whether a defendant healthcare provider's acts or failure to act, as the case may be, caused the injury complained of by plaintiff in the lawsuit, or the standard of care or standard of practice employed by the defendants."

HAT ADVANTAGE: Allowable communications with providers pursuant to a Qualified Protective Order has leveled the playing field for defense counsel. Without access to the treating physicians, the defense cannot uncover the information in the medical records that will assist the trier of fact.

Separate Notice Must be Given to Medical Providers Following Nonsuit and Before Re-Filing.

Foster v. Chiles, 2015 WL 343872 (Tenn. Jan. 27, 2015)

Plaintiffs filed suit after appropriately serving pre-suit notice. Following a nonsuit, the plaintiffs re-filed their identical claims without sending another pre-suit notice. The defendants moved to dismiss on the basis that pre-suit notice must be given prior to the time each health care liability complaint is filed. The plaintiffs claimed that the original notice sufficed for both the original and re-filed complaints. The trial court granted the motion, but the Court of Appeals reversed. The Supreme Court reversed the Court of Appeals, holding that the second suit "was the institution of a new and independent action. . . . Defendants had no advance notice of the second suit, no chance to investigate the claim, and no opportunity to pursue settlement negotiations before the suit was filed. This was not the result intended by the Legislature in enacting § 29-26-121(a)(1)." Note that the Supreme Court also held that "*dismissal without prejudice* is the proper sanction for noncompliance with Tenn. Code Ann. § 29-26-121(a)(1)." *Id.* at *4 (emphasis added).

HAT ADVANTAGE: Defense counsel can seek dismissals for those lawsuits refiled without strict compliance with the most updated notice provisions. Plaintiffs can no longer rely on original notices.

120 Day Extension Applies to Cases Re-Filed Under Savings Statute.

Tinnel v. East Tennessee Ear, Nose, and Throat Specialists, P.C., 2015 WL 791625 (Tenn. Ct. App. Feb. 25, 2015)

Plaintiff gave proper pre-suit notice in her original complaint, prior to nonsuiting. Within one year of the voluntary dismissal, the plaintiff again sent proper pre-suit notice to the defendants. The second suit was filed within 120 days after the one-year anniversary of the voluntary dismissal. Defendants moved to dismiss on the basis that

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the re-filed complaint was untimely because not filed within one year of the voluntary dismissal. The trial court granted the motion and the Court of Appeals reversed, explaining that it was "unable to conclude that the General Assembly would require plaintiffs to provide pre-suit notice before refiling under the saving statute and yet deprive them of the 120-day extension. . . . In so holding, we reject Defendants' argument that Plaintiff was only entitled to the use of one extension. Plaintiff's re-filed complaint was a new and independent action."

HAT ADVANTAGE: Another one for Plaintiffs.

Summary Judgment Standard—Return to the Federal Standard

Rye v. Women's Care Ctr. of Memphis, MPLLC, No. W201300804SCR11CV, 2015 WL 6457768 (Tenn. Oct. 26, 2015)

In *Rye v. Women's Care Center of Memphis*, the Tennessee Supreme Court issued an opinion, which returned Tennessee to the Federal Standard for a Motion for Summary Judgment. The Court previously issued an opinion in 2008, which changed the landscape of Summary Judgment law in Tennessee. Subsequently, the Tennessee Legislature enacted a statute, which effectively returned the standard to the federal standard. However, this statute and the fact that *Hannan* was still good law left confusion in the state of Tennessee Summary Judgment Law. In *Rye*, the Court admitted the confusion created by the *Hannan* standard and modified the Summary Judgment to allow the defendant to be granted summary judgment when the defendant affirmatively negates an essential element of the nonmoving party's claim or by demonstrating that the nonmoving party's evidence ta the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.

HAT ADVANTAGE: As it should be, Plaintiffs have the initial burden to establish the elements of their case. The burden-shifting was returned to its rightful order.

Clarification of the Tennessee Health Care Liability Act and Actions Against Health Care Providers

Ellithorpe v. Weismark, No. M201400279SCR11CV, 2015 WL 5853873 (Tenn. Oct. 8, 2015)

Estate of Thibodeau v. St. Thomas Hosp., No. M201402030COAR3CV, 2015 WL 6561223 (Tenn. Ct. App. Oct. 29, 2015)

The Tennessee Supreme Court recently issued opinions clarifying the application of the Tennessee Health Care Liability Act, which had been frequently disputed in recent years. Under the THCLA, any claim relating to health care services by a health care provider are subject to the pre-suit notice and good faith certificate requirements. However, Plaintiffs often argue that claims for ordinary negligence or violations of the Tennessee Adult Protection Act did not require them to provide pre-suit notice or a good faith certificate. In *Ellithorpe*, the Court evaluated the THCLA legislation and overruled a prior case (Estate of *French)* which required the court to analyze the facts of the case to determine whether it would be considered a health care service. In the opinion, the Court made it clear that the THCLA abrogated an earlier decision and "any civil action or claim is subject to the Tennessee Health Care Liability Act regardless of any other claims, causes of action or theories of liability alleged in the Complain." (T.C.A. 29-26-101). Through *Ellithorpe*, the Tennessee Supreme Court settled an often-disputed issue in the lower courts and reinforced the THCLA's pre-suit notice and good faith certificate requirements.

This issue was most often disputed in nursing home litigation due to the fact that Plaintiffs often included the negligence of certified nursing assistants. Plaintiffs often relied on the inclusion of those allegations for the argument that they did not need to provide pre-suit notice. However, the THCLA specifically includes a CNA within the statute and through the *Ellithorpe* opinion; the Court reinforced the position that pre-suit notice and a good faith certificate are required for those claims. Therefore, a Plaintiff is required to provide pre-suit notice and a good faith certificate in cases involving violations of the care in a nursing home.

The Tennessee Court of Appeals has already issued an opinion which applied the court's decision in *Ellithorpe*. In *Estate of Phyllis Thibodeau et. Al v. St. Thomas Hospital*, the court found that the Plaintiff was required to provide pre-suit notice and a good faith certificate to the Defendant Hospital in a case alleging liability for injuries sustained as a result of the hospital employees' failure to properly support a patient as the staff attempted to transfer her from a bariatric stretcher to her car. The Tennessee Court of Appeals held that when applying the clear language of the THCLA, the allegations fit the definition of a health care liability action and was subject to the pre-suit notice requirements.

HAT ADVANTAGE: The issue of multiple claims against a health care provider has finally been resolved. Defendants now can rely exclusively on the THCLA as the basis for claims as opposed to separate claims for negligence and medical malpractice.

A Health Care Agent Can Sign an ADR Agreement

Bockelman v. GGNSC Gallatin Brandywood, LLC, No. M2014-02371-COA-R3-CV (Tenn. Ct. App. Sept. 18, 2015).

The Tennessee Court of Appeals recently rendered an opinion granting a Motion to Compel Arbitration in favor of the nursing home. The opinion provides clarity to lower courts in deciding a significantly debated issue in Tennessee: whether a health care agent form provided sufficient authority to sign an arbitration agreement. The Court also reinforced the principle that a person must be held to the contract that he/she signs, whether or not the person reads the contract, even when the plaintiff asserted that the facility misrepresented the terms of the ADR.

HAT ADVANTAGE: In the Nursing Home Arbitration Agreement context, the opinion allows for a facility to rely on a health care agent form in having the agent sign the arbitration agreement. Furthermore, an arbitration agreement is more likely to be enforced based on this opinion. The court emphasized the presumption that is triggered when a person signed the contract.

We'll look forward next month's edition with more legal updates and then turn our attention to the legal and legislative issues on the horizon for 2016.

Please join us in New York City for the fourth annual Litigation Risk and Defense Strategies for Long-Term Care & Assisted Living Providers, Insurers, and Brokers Conference March 31 and April 1, 2016.

We are grateful for our work with you in 2015, and we look forward to working together in the new year. Happy 2016!

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