



Click below to link
to our offices in:

Chattanooga

Nashville

Knoxville

Memphis

Dalton

If your server does not
support graphics,
[click here](#)

**Leitner,
Williams, Dooley
and Napolitan,
PLLC will be
hosting many
upcoming
events!**

**To see upcoming
events:
[click here](#)**

LWDN Quick Flash

October 2008

A PUBLICATION OF LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC

The Future of Tennessee Long-term Care Litigation

By John Curtis, Esq. and Bruce Gill, Esq.

A case now pending before the Tennessee Court of Appeals will likely have a significant effect on the future of Tennessee long-term care (LTC) litigation. To understand the significance of the case, we must briefly review the history of this litigation, the recent developments, the facts of the pending case and the issues on appeal.

The History of Tennessee LTC Litigation

Tennessee long-term care litigation has traditionally focused on one patient, one provider and one cause of action. Because most such cases have involved the provision of medical or nursing care, the single cause of action has been medical malpractice.

Under the Tennessee Medical Malpractice Act,^[1] the plaintiff was required to prove by expert testimony the standard of care, the breach of the standard of care and any resulting damages. The costs of defending such cases, and the resulting settlements or judgments, have been relatively reasonable.

Recent Developments in Tennessee LTC Litigation

Plaintiff attorneys in other states, however, were desirous of increasing recoveries in these cases. Accordingly, they developed a different approach. They reference not only the alleged lack of care for the one patient but the lack of care for many patients. They sue not only the defendant nursing home but also the affiliated companies that would have deeper pockets. They pursue not only a medical malpractice theory but also such theories as ordinary negligence, negligence *per se* based on the violation of federal or state statutes or regulations and statutory abuse and neglect.

This approach has resulted in significantly increased defense costs and damage

exposure. More specifically, defense costs are usually in the six-figure range, and settlements and judgments are often in the seven-figure range.

Approximately 10 years ago, the plaintiff firms which developed this new model for LTC litigation began to file lawsuits against Tennessee nursing homes. The resulting dilemma was whether the Tennessee Medical Malpractice Act would require the plaintiff firms to prepare and try their cases in the traditional fashion or whether they could prosecute these actions as they had in their home states. Tennessee trial judges wrestled with this question for some years, with little guidance from the appellate courts.

The Court of Appeals first addressed a few of the resulting issues in the 2007 case of *Conley v. Life Care Centers of America, Inc.* [\[ii\]](#) The principal issues in the case were whether a dangerous patient should have been admitted to the facility and whether the facility should have done more to prevent this patient from harming another patient. Thus, the case did not involve the more typical long-term care issues. Nevertheless, the Court of Appeals indicated on these facts that the plaintiff could only pursue a medical malpractice theory, rather than a statutory abuse and neglect theory. Furthermore, the court indicated that the federal regulations were far too vague to constitute the standard of care. Finally, the court ruled that evidence about such matters as grooming, hygiene and toileting should not be admitted because such evidence had no bearing on the alleged malpractice and the related injuries.

The NHC HealthCare/McMinnville Litigation

The *Conley* decision was handed down only a few weeks before the trial of *Myers v. NHC HealthCare/McMinnville, LLC*. The patient was 88 years old at the time of his admission to the facility in March 2004. He sustained a few falls, with the last fall in January 2005 resulting in a hip fracture. He returned from the hospital following surgical repair with six pressure ulcers. Five of these ulcers were eventually healed, but a heel ulcer progressed to stage IV before improving to a stage II at the time of discharge. The patient also developed leg contractures. Pain management for these injuries was alleged to have been insufficient.

On the last day of the nursing home admission, the patient rapidly deteriorated and was sent to the hospital. He was there diagnosed with pneumonia and urosepsis. He sustained a myocardial infarction and subsequently developed congestive heart failure. He passed away at another nursing home in August 2005.

The patient's family was represented by the Wilkes & McHugh law firm, which is generally acknowledged to be one of the most prominent plaintiff firms in such cases. The plaintiff attorneys were permitted to introduce evidence regarding the alleged lack of care to multiple patients. They were permitted to pursue a claim not only against the defendant nursing home, but also against an affiliated company and the parent company. They were permitted to pursue an ordinary negligence theory, in addition to a medical malpractice theory. From the defense perspective, there were numerous examples of improper evidence and improper argument. In summary, the plaintiff attorneys were permitted to try the case in accordance with their preferred model, rather than in strict compliance with the Tennessee Medical Malpractice Act and the *Conley* decision.

The jury ultimately found that the defendants were not responsible for the patient's death, but awarded the medical expenses plus \$4 million for pain and suffering, loss of enjoyment of life and disfigurement. The jury further concluded that the defendants were guilty of reckless behavior that warranted punitive damages. The trial judge ruled that the affiliated company and the parent company were entitled to judgment as a matter of law on the punitive damage claims.^[iii] The jury thereafter returned a punitive damage verdict against the defendant nursing home in the amount of \$163,402.

The NHC HealthCare/McMinnville Appeal

The case was appealed and argued before the Court of Appeals in August 2008. A decision could be rendered in 2008 but will more likely occur in early 2009. Given the importance of the issues to the parties and to the future of Tennessee LTC litigation, it seems likely the Tennessee Supreme Court will eventually be asked to accept a further appeal.

The defendants first argued on appeal that the verdict is clearly excessive. A mathematical calculation would indicate the plaintiffs were awarded \$20,000 per day in non-economic damages, and neither side could find a reported decision in which damages anywhere close to this amount have been approved.

Defendants further argued that the excessive verdict was the probable result of the jury's consideration of improper evidence and improper argument. More specifically, the defendants argued as follows:

- Evidence and argument regarding the stock-holdings of the parent company's chairman and the size of the affiliated entities should have been excluded as irrelevant and prejudicial. Tennessee law generally holds that evidence regarding a defendant's assets is inadmissible in the

compensatory phase of the trial.

- Evidence and argument about “profits over people” should have been excluded as irrelevant and prejudicial. No Tennessee appellate court has previously addressed this issue, but such inflammatory argument has elsewhere been rejected.
- Evidence related to the patient’s hygiene and incontinence care should have been excluded as irrelevant and prejudicial. Such evidence would seem to violate the Court of Appeals’ prior holding in the *Conley* decision because such evidence has no bearing on the alleged malpractice and the related injuries.
- Evidence related to other patients, including evidence about their incontinence care, should have been excluded as irrelevant and prejudicial. Because the *Conley* case indicates such evidence as to the patient should be excluded, then clearly such evidence as to others should be excluded.
- Evidence related to the certification, training and performance of facility employees should have been excluded as irrelevant and unfairly prejudicial. Such evidence would have no bearing on the alleged malpractice, and would serve only to confuse and inflame the jury.
- Any reference to the federal regulatory standard on staffing to “meet the needs of residents” should have been excluded. The *Conley* decision indicated that such a standard was too vague to constitute the standard of care, and plaintiffs’ experts, lay witnesses, and attorneys should not have been permitted to repeatedly reference the regulatory requirement, particularly when the proof showed that the facility’s staffing actually exceeded the community standard.
- Testimony by CNAs regarding “short-staffing” should have been excluded because they lack the expertise to determine appropriate staffing standards. The Tennessee Medical Malpractice Act requires proof of the standard and any breach of the standard by expert testimony.
- Evidence and argument regarding the destruction of activities of daily living (ADL) tracking records in accordance with the facility’s record retention policy and applicable law should have been excluded. The plaintiffs were permitted to argue that the facility improperly destroyed medical records, even though Tennessee law permits such a negative inference only where a party has intentionally destroyed records for an improper purpose.
- No professional staff should have been compelled to testify about whether any other professional staff complied with the standard of care. Tennessee law holds that a caregiver is required to testify only about his own compliance with the standard of care, and facility staff should not be compelled to serve as expert witnesses for the plaintiff.
- No non-medical witness should have been permitted to testify about medical causation. Tennessee law indicates, in particular, that nurses are not qualified to testify about medical causation.
- Plaintiff counsel should not have been permitted to suggest a dollar value of the plaintiffs’ claim to the jury. The Tennessee Medical Malpractice Act indicates it is improper to disclose the demand in the Complaint to a jury [\[iv\]](#), and courts interpreting the Act further have held that no dollar amount may be suggested to a jury in closing argument. Plaintiffs argued that they should be excluded from this requirement because they were pursuing an ordinary negligence claim, in addition to a malpractice claim.

- Plaintiff counsel should not have been permitted to argue in the first phase of the trial that a “message” should be sent to the defendants. In cases involving a punitive damage claim, the first phase of the trial is restricted to consideration of liability, any compensatory damages, and whether punitive damages are warranted. It is only in the second phase of the trial, when the jury considers the amount of damages necessary to deter future reckless conduct, that a “send a message” argument might be appropriate.

Interestingly, the questions directed by the Court of Appeals to counsel during oral argument dealt primarily with two other issues. The first was whether plaintiffs should have been permitted to proceed under only a medical malpractice theory or whether they were properly permitted to also proceed under an ordinary negligence theory. The Tennessee Supreme Court has indicated that when a claim involves conduct “which constitutes or bears a substantial relationship to the rendition of medical treatment by a medical professional, the medical malpractice statute is applicable.”[\[v\]](#) Plaintiffs argued that the inadequate “custodial care” provided by non-licensed CNAs provided a basis for the ordinary negligence claim, despite the fact that such care was provided in accordance with a nursing plan to promote the patient’s health and well-being. Plaintiffs further argued that non-medical personnel determined the facility budget, which in turn controlled the staffing and affected the quality of care.

Additional questions were directed to the defendants’ corporate structure. Plaintiffs asserted that the affiliated companies were liable as principals for the acts of their alleged agent, the nursing home. Alternatively, they asserted the affiliated companies were liable for their own actions, primarily because of their involvement in the budget process, which affected the staffing and the quality of care. The affiliated defendants asserted that they had no involvement in the patient care. Furthermore, they did not exercise complete dominion over the budget process or the staffing. In any event, staffing at the facility exceeded the community standard.

Conclusion

The Court of Appeals will soon address several issues of great significance to the future of Tennessee LTC litigation. Its decision may determine the proper parties to such litigation, the legal theories that can be raised, the scope of discovery that can be conducted and the evidence and argument that can be presented at trial. The intended purpose of the Tennessee Medical Malpractice Act was “to contain the costs of medical malpractice litigation”. The Court of Appeals’ decision may well determine whether this purpose is fulfilled.

A future tutorial is expected to address the appellate decision, its impact on Tennessee LTC litigation and its practical implications for the operation of LTC facilities.

John Curtis is a member in the Chattanooga office of Leitner, Williams, Dooley & Napolitan, which also has offices in Memphis, Nashville and Knoxville. He has defended over 100 LTC cases, including two cases against out-of-state firms that resulted in defense verdicts.

Bruce Gill is also a member of the firm and has defended several LTC cases. He and Curtis have actively pursued the enforcement of LTC arbitration agreements and have several reported appellate decisions, including the only decision to date by the Tennessee Supreme Court.

The information contained in this tutorial is intended for general guidance and is not intended to provide specific legal advice. Because every legal situation is fact dependent, THCA members should consult a qualified attorney for specific legal advice.

[\[i\]](#) Tenn. Code Ann. §29-26-101, *et.seq.*

[\[ii\]](#) 236 S.W.3d 713 (Tenn. Ct. App. 2007).

[\[iii\]](#) The trial judge nevertheless permitted the jury to render an advisory verdict with respect to punitive damages against the affiliated company and the parent company, although advisory verdicts are not permissible under Tennessee law. The jury rendered a punitive damage verdict against the affiliated company in the amount of \$1,000,000, and against the parent company in the amount of \$28,635,000, but these awards were vacated by the trial judge.

[\[iv\]](#) Tenn. Ann. Code §29-26-117.

[\[v\]](#) *Gunter v. Laboratory Corp. of America*, 121 S.W.3d 636, 641 (Tenn. 2003).

Submitted by:

John B. Curtis, Esq.

Bruce D. Gill, Esq.

Leitner, Williams, Dooley, & Napolitan, PLLC

801 Broad Street, 3rd Floor

Chattanooga, TN 37402

Phone: 423.265.0214

Fax: 423.266.5490

[mailto: john.curtis@leitnerfirm.com](mailto:john.curtis@leitnerfirm.com)

[mailto: bruce.gill@leitnerfirm.com](mailto:bruce.gill@leitnerfirm.com)

www.leitnerfirm.com

If you would like to unsubscribe to this newsletter, please reply to this email with "Unsubscribe" in the subject box. Thank you.

The LWDN Client Update Quick Flash is published for the benefit of our clients. While each article is written to be informative and helpful, we recognize that every situation is unique in its legal considerations. The firm encourages readers to consult an attorney regarding particular application and interpretation of the law. Permission is granted to make and distribute, without charge, copies of this entire document provided that such copies are complete and identify Leitner, Williams, Dooley & Napolitan, PLLC as the author. All other rights are reserved.