

Punitive Damages

- Punishment – deterrence
- Discourage others – industry message
- How?

“Accountability
breeds
Responsibility.”

- Stephen Covey

Punitive Damages

- Malice
- Falsifying medical records / cover-up

“Malice”

- **Conscious** disregard
- Leona’s **Rights and Safety**
- **Great Probability** of **Substantial Harm**

Conscious:

- March 29, 2011
- Family request
- Doctor order
- Knows the need
- Knows the danger

Disregard

- 2 years, 2 months . . .



Conscious Disregard

Q. Can we agree that if a nursing aide turned Leona in bed alone when this order is in place that would be **disregarding** Leona Maxim's **safety**?

A. Yes.

Q. That would be **disregarding** Leona's **right** to be assisted by two people, fair?

A. Yes.

(Boyer 16:1-7)

Conscious Disregard

Q. The nursing aides who provide a lot of care to residents, they don't sign off on the TAR, that's the nurses?

A. Correct.

Q. And when nurses sign off they are acknowledging both they and the nursing aides they're supervising provided that level of care, correct?

A. Correct.

Q. That requires communication with the aides to make sure that's happening, right?

A. Yes.

Q. Someone shouldn't sign off as a nurse on a physician's order as being complied with if the aides weren't complying with it, correct?

A. Correct.

Rights and Safety

Q. Can we agree that on June 3rd, 2013, Leona Maxim had the ***right*** to be provided assistance requiring positioning in bed from two people?

A. . . . every day she should have that.

(Jose Giner, 29:18-23)

Rights and Safety

Q. . . . Can we agree that if [the order] wasn't actually discontinued or changed by a doctor, Leona still had the *right* to receive that level of care, correct?

A. If it warranted it, yes. If a doctor hadn't said otherwise or if she hadn't been discharged or where the orders would be gone or anything like that, yes.

(Fovozzo 145:10-16)

Rights and Safety

Q. Under the scenario I'm suggesting, either that order's in place, because we're go -- the jury's going to see other days when there's no question the order's in place, or if the order fell off the chart for some reason other than a doctor discontinuing it. So ***under either of those two scenarios***, can we agree Leona Maxim needed or ***had the right to have a second person*** on the other side of the bed assisting in that care?

A. Yes.

(Fovozzo 150:23-151:7)

Rights and Safety

Q. Did you understand Leona to be somebody who when being repositioned in bed needed a second person on the other side to ***stay safe***?

A. Yes.

Q. So can we agree that Kindred – Stratford should have insured for Leona's safety that when an aide is repositioning her in bed that there be someone on the other side to help ***keep her safe***?

A. Yes.

(Boyer 26:10-20)

Rights and Safety

Q. That's another reason the balance, the trunk control, the bed mobility, that Leona needed a second person on the other side of the bed, correct?

A. Yes.

Q. ***Without regard to whether there's an order in place***, this evaluation would lead you to conclude someone else needed to be on the other side of that bed, fair?

A. Yes.

(Boyer 24:24-25:7)

Great Probability / Substantial Harm

Q. We looked at the order that was put in place to make sure there were two people there to assist Leona in bed, correct?

A. Yes.

Q. We can agree the reason for that order to have two people there is so she **wouldn't be rolled out of bed**, correct?

A. Yes.

Q. And the entire point of that order is to prevent her from getting rolled out of bed onto the floor, right?

A. That's why the order was put in place.

(Giner 25:19-26:11)

Great Probability / Substantial Harm

Q. We can agree that rolling out of bed can lead to serious injuries?

A. It could, yes.

Q. They could lead to things like fractures, correct?

A. Rolling out, yes.

Q. It could lead to things like death, right?

A. Rolling out, yes.

Q. Resident falls can be a matter of life and death, true?

A. I agree.

(Giner 27:4-28:9)

Great Probability / Substantial Harm

Q. Part of why you do that is because falls can be dangerous for a resident in a nursing home, correct?

A. Yes.

Q. They can be a matter of ***life and death***?

A. Absolutely.

Q. That's partly because of the injuries that can be sustained when a resident sustains a fall, correct?

A. Yes.

(Fovozzo 141:1-10)

Great Probability / Substantial Harm

Q. You're very familiar with the risks broken hips pose to nursing home residents, right?

A. Yes.

Q. In fact, that's a primary risk that when someone has a serious fall in a nursing home it can break their leg or if it's high enough it's called the hip, correct?

A. Yes.

(Boyer 56:4-11)

Great Probability / Substantial Harm

Q. Specifically, if an order for two-person assist for care that requires position changes in bed is in place, and a nursing aide by themselves goes in and turns the resident to provide care, so there's a position change, right?

A. Correct.

Q. Under those circumstances, that would create a **great probability of causing substantial harm** to someone like Leona, correct?

A. It could possibly.

(Boyer 17:14-25)

Great Probability / Substantial Harm

Q. . . . With that order in place, ***Leona's need for that second person assisting***, if a Kindred - Stratford aide goes in by themselves without a second person on the other side of the bed and turns Leona on her side, that puts Leona at ***risk of injury***?

A. Possibly.

Q. Injuries that could include falling out of bed?

A. Possibly.

Q. And falling out of bed as it would be positioned when someone is providing that type of care, that could ***lead to the resident breaking bones***, fair?

A. It could possibly lead to that.

(Boyer 14:25-15:18)

Great Probability / Substantial Harm

Q. It could lead to broken bones like a broken leg that happened in this case, correct?

A. Correct.

Q. And those are all things nurses and nursing aides at Kindred - Stratford should have known when providing care to residents like Leona?

A. Yes.

(Boyer 15:19-25)

“Malice”

- **Conscious disregard**
- **Leona’s Rights and Safety**
- **Great Probability of Substantial Harm**



“Clear and Convincing”

- “firm belief or conviction”
- “more than evidence that simply outweighs or overbalances ***the evidence opposed to it***”

Not Checking Skin

Q. [am care item] 21, inspect the skin of the entire body. Pay close attention to the skin. That's to check for things like skin breakdown or wounds?

A. Correct.

Q. So ***every single day***, even if they don't have any special issues going on with them, a nursing aide is supposed to check their skin, correct?

A. Yes.

(Boyer 29:19-30:1)

Not Checking Skin

Q. That's because it's ***very important to resident safety*** if they start having skin issues that ***should be recognized as early as possible***?

A. Yes.

Q. That's something you know as a nurse providing care to these residents?

A. Yes.

(Boyer 30:2-8)

Not Checking Skin

Q. So if someone's checking Leona's skin every day ***as required to do under this policy***, they should catch a skin issue best case scenario when it's in that preliminary phase or at least Stage I; is that fair?

A. Yes.

Q. ***Should never be Stage II*** by the time anyone notices it, fair?

A. Yes.

Q. That's just a normal resident, right? That's not somebody who has a particular risk of skin breakdown?

A. Yes.

(Boyer 30:24-31:11)

Not Checking Skin

Falsifying Medical Records

- “new order”?
- “alerted family”?

Falsifying Medical Records

Q. . . . Were you ever notified by anyone from Kindred that a new order was being put in place –

A. No.

Q. -- for two people? Would that have surprised you?

A. Yes, it would have.

Q. Why is that?

A. Because there already was an order in place, and, to the best of my knowledge, that order was never changed, that order was never deleted. In my mind, that order still existed.

(Christine Guest 33:8-34:4)

Falsifying Medical Records

Q. There's a note in the records, Marilyn, it's from June 3rd, 2013, says, new order. Two-person assist for all care given in bed that requires position change of resident. Family aware of new orders at this time. I want to ask you, Marilyn, did anyone from Kindred come to you and say we're putting in a new order for two-person assist?

A. No.

Q. Would that have surprised you?

A. Yes, it would surprise me because the order was always in place there's two people in the room.

(Marilyn Mazzone 42:1-12)

Falsifying Medical Records

Q. Well, there's no evidence in this case that Leona Maxim's family was ever told that the order to have two people assist was no longer in the chart, is there?

A. I'm not sure.

Q. You don't know of any, do you?

A. I do not.

(Jose Giner 29:11-17)

Falsifying Medical Records

- “An intentional alteration, falsification, or destruction of medical records by a medical professional to avoid liability for medical negligence is ***sufficient to show actual malice*** and punitive damages may be awarded whether or not the act of altering, falsifying, or destroying records directly causes harm to the patient.”

Attorney Fees

- Who should bear the cost?
- Years
 - Fighting for accountability
 - Fighting against accountability
- Whether, not how much

For-Profit Corporation